The Section 129(1)(a) Notice as a Prerequisite for Debt Enforcement in terms of the National Credit Act 34 of 2005

By

Rudene Crystal Maphalla

Student number: 21197599

Submitted in accordance with the requirements for the degree

Magister Legum

at the

University of Pretoria

Supervisor: Dr Renke

2014

1 General Introduction

1 1 Background

The National Credit Act 34 of 2005[1] came into effect on 1 June 2007.[2] The primary purpose of the NCA is "to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market, and to protect consumers".[3]

Subject to certain exemptions,[4] the NCA applies to all credit agreements entered into between parties dealing at arm's length within the Republic of South Africa.[5]

An agreement constitutes a credit agreement for the purposes of the NCA if it is

(a) a credit facility;[6]
(b) a credit transaction;[7]
(c) a credit guarantee;[8] or
(d) any combination of the above.

As will become apparent in the paragraphs to follow, the Act favours consumers by affording considerable assistance to them. This often tends to be demanding and burdensome for credit providers, as creditors may suffer irreversible damage,

---

[1] Hereinafter referred to as the National Credit Act, the Act or the NCA.
[2] The President assented to the NCA on 10 March 2006 and the NCA came into effect incrementally on 1 Jun 2006, 1 Sep 2006 and 1 Jun 2007: See Proc 22 in *GG* 28824 of 11 May 2006.
[3] Preamble to the NCA and s 3.
[4] See SS 4, 5 and 6 of the NCA.
[5] "Dealing at arm's length" is not defined in the Act. However, s 4(2)(b) states that in the following circumstances, the parties are not deemed to be dealing at arm's length, and therefore, the NCA is not applicable:
"(i) a shareholder loan or other credit agreement between a juristic person, as consumer and a person who has a controlling interest in that juristic person, as credit provider;
(ii) a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer;
(iii) a credit agreement between natural persons who are in a familial relationship; and-
(aa) are co-dependent on each other; or
(bb) one is dependent upon the other; and
(iv) any other arrangement-
(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or
(bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length".
[6] As described in s (8)(3).
[7] S 8(4) lists the different credit transactions subject to the Act. Those transactions are then in turn defined in s 1, with the exception of the "other agreement" which is defined in s 8(4)(f).
[8] As described in s 8(5).

particularly when movable goods are involved which may depreciate in value pending the lapse of the time limits prescribed by the Act.

The Act introduces a new two stage debt enforcement process, namely the process before going to court and the process in court. The sections of the Act which outline the first stage of the process are the following:

(a) Section 129(1)(a): which stipulates that if a consumer fails to fulfil an obligation under a credit agreement, the credit provider may bring this failure to the consumer's attention in writing and propose that the consumer refers the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction. Section 129(1)(b) states that the credit provider may not set in motion the wheels of any formal legal proceedings to enforce the agreement prior to providing notice to the defaulting consumer and meeting any further requirements set out in section 130.
(b) Section 130(1) provides that a credit provider may approach a court for an order to enforce a credit agreement only if the consumer is still in default and has been in default for a period of at least 20 business days and at least 10 business days have passed since the credit provider delivered, or made available, the section 129(1)(a) notice to the consumer.[9]

1 2 Research Statement and Objectives

The broad problem statement of this dissertation is to investigate and evaluate the section 129(1)(a) notice as a prerequisite for debt enforcement in terms of the NCA with particular reference to the following:

(a) The meaning of the term "debt enforcement"?
(b) Is the section 129(1)(a) notice a prerequisite for debt enforcement?
(c) The content of the section 129(1)(a) notice and the relevant notice periods.
(d) Is it a requirement that the section 129(1)(a) notice reaches the consumer in order to be effective?

[9] S 130(3)(a) states that a court must satisfy itself, in the instance or particular situation to which s 129 applies, that the procedure set out therein has been complied with.

The abovementioned research will be conducted *inter alia* with reference to relevant case law. In addition, an overview will be provided of the provisions of legislation preceding the NCA that pertained to debt enforcement notices.

As far as the research objectives of this study are concerned, each of the aspects mentioned in sub paragraphs (a)-(d) above will form the subject matter of a different research objective. The same holds for the overview of the provisions of the Act's predecessors as far as debt enforcement notices are concerned. The reason for the inclusion of this research objective is to establish whether the measures under the Act's predecessors could be considered for purposes of recommending improvements to the NCA.

In addition, final submissions and recommendations will be made based on the research conducted.

1 3 Delineation and Limitations

Except for the matters mentioned in paragraph 1 2 above, any other aspect in relation to debt enforcement in terms of Chapter 6 Part C of the NCA will not be addressed in this research. This *inter alia* includes

(a) the interplay between debt review measures in the Act and debt enforcement; and
(b) the second stage of the debt enforcement process, the process in court.[10]

1 4 Proposed Structure

This dissertation is structured as follows:

(a) Paragraph 1 deals with the background information to the study, sets out the problem statement and the research objectives in relation thereto.
(b) An overview of the debt enforcement notice provisions in terms of the NCA's predecessors will be provided in paragraph 2.
(c) In paragraph 3 the use of the terms "debt enforcement" and "enforce" are analysed.

[10] Mentioned in para 1 1 above.

(d) In paragraph 4 the question whether the section 129(1)(a) notice is a prerequisite for debt enforcement is considered and if so, what are the consequences of non-compliance.
(e) Paragraph 5 deals with the content requirements of a section 129(1)(a) notice with reference to case law. Thereafter, the notice periods stipulated in the NCA are set out, with specific emphasis on section 130(1) of the Act.
(f) Paragraph 6 addresses the question as to whether the section 129(1)(a) notice must reach the consumer in order to be effective. This is done with reference to relevant case law.
(g) Finally, paragraph 7 consists of a brief summary of all the relevant conclusions made and advances various recommendations.

1 5 Terminology

In this study the concepts "consumer", "debtor" and "credit receiver" will be used interchangeably. The same holds for the concepts "credit provider", "creditor" and "credit grantor".

"Consumer" is defined in section 1 of the NCA as-

> (a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;
> (b) the party to whom money is paid, or credit granted, under a pawn transaction;
> (c) the party to whom credit is granted under a credit facility;
> (d) the mortgagor under a mortgage agreement;
> (e) the borrower under a secured loan;
> (f) the lessee under a lease;
> (g) the guarantor under a credit guarantee; or
> (h) the party to whom or at whose discretion money is advanced or credit granted under any other credit agreement.

"Credit provider" is defined in the Act[11] as-

> (a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;
> (b) the party who advances money or credit under a pawn transaction;

[11] S1.

(c) the party who extends credit under a credit facility;
(d) the mortgagee under a mortgage agreement;
(e) the lender under a secured loan;
(f) the lessor under a lease;
(g) the party to whom an assurance or promise is made under a credit guarantee;
(h) the party who advances money or credit to another under any other credit agreement; or
(i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into.

1 6 Reference Techniques

(a) For the sake of convenience the masculine form is used throughout this dissertation to refer to a natural person.
(b) The full titles of the sources referred to in this study are provided in the bibliography, together with an abbreviated “mode of citation”. This mode of citation is used to refer to a particular source in the footnotes. However, legislation and court decisions are referred to in full.

2 An Overview of Debt Enforcement Notices in terms of Legislation Preceding the National Credit Act

2 1 Introduction

As is invariably the case, it is necessary to canvas the predecessors of the NCA in order to adequately sketch the relevant legal position. In what follows there are references to sections of the Hire-Purchase Act 36 of 1942 as amended,[12] the Credit Agreements Act 75 of 1980[13] and a brief discussion of the Sale of Land on Instalments Act 72 of 1971.[14] These Acts have a long history and a coherent body of precedents on the question of whether a default notice must in fact reach a consumer in order to be effective has developed. This question formed the focus of the courts' inquiry in a number of cases.[15]

2 2 The Hire-Purchase Act

The Hire-Purchase Act came into effect on 1 May 1942.[16] The purpose of the Hire-Purchase Act, according to its long title, was "[t]o make provision for the regulation of hire-purchase agreements and of instalment sales subject to resolutive conditions, and for matters incidental thereto". The Act applied both to sale agreements by instalment and hire-purchase agreements in relation to movable goods. The only qualification was that the purchase price must not have exceeded R4 000.[17]

Section 12 of the Hire-Purchase Act dealt with the limitation of a seller's right to enforce certain provisions of an agreement. Prior to 1965, section 12 of the Hire-Purchase Act read as follows:

> No seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce –
> …

[12] Hereinafter referred to as the Hire-Purchase Act.
[13] Hereinafter referred to as the Credit Agreements Act.
[14] Hereinafter referred to as the Sale of Land Act.
[15] Otto (2010) *SA Merc LJ* 595.
[16] Flemming (1974) 17.
[17] S 2(1)(a) of the Hire-Purchase Act.

> (b) any provision in the agreement for the payment of any amount *as damages, or for any forfeiture or penalty, or for the acceleration of the payment of any instalment*, unless *he has made written demand*[18] to the buyer to carry out the obligation in question within a period stated in such demand, not being less than ten days, and the buyer has failed to comply with such demand.

In 1965 section 12 was amended.[19] The relevant portion thereafter read as follows:

> No seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce-
> (a)……
> (b) any provision in the agreement for the payment of *any amount as damages, or for the acceleration of the payment of any instalment, unless he has by letter handed over to the buyer or sent by registered post to him at his last known residential or business address*, made demand to the buyer to carry out the obligation in question within a period stated in such demand, not being less than ten days, and the buyer has failed to comply with such demand.[20]

Section 12(b) after the amendment thus gave clear and precise direction that the seller was precluded from taking certain steps against the purchaser for the payment of damages, or for the acceleration of the payment of any instalment as a result of the latter's breach of their agreement unless —

(a) the seller had made a written demand to the purchaser to act in accordance with the agreement to which the buyer was legally bound;
(b) the letter of demand either had to be handed over to purchaser, or sent to the purchaser to his last known residential or business address.

The letter had to state that the purchaser failed to comply with his obligations and that he was required to do so within a period specified in the demand, which had to be not less than ten days.[21]

---

[18] Emphasis supplied.
[19] Hire-Purchase Amendment Act 30 of 1965.
[20] Emphasis supplied.
[21] *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) para 126, hereafter referred to as the *Sebola* case.

Due to the fact that the letter of demand could either be hand delivered or sent by registered mail, credit providers were often encountered with a challenge, when letters were sent by registered mail. The problem often encountered was whether the letter had to reach the consumer in order to be effective and in addition thereto, the issue on how the "ten day period" had to be calculated.

In *Weinbren v Michaelides*,[22] the seller, in purporting to comply with the provisions of section 12(b) of the Hire-Purchase Act, as it read prior to the 1965 amendment, addressed a letter to the purchaser and sent it by registered post to the purchaser's last known address. The letter failed to reach the purchaser. The Post Office returned it to the seller with a brief and unsubstantiated note stating "gone away". The court, in *Weinbren*, expressed the view that based on first impression, and failing to be convinced otherwise, section 12(b) had the *prima facie* result that the demand was required to be in writing and had to reach the purchaser. In this case, Ramsbottom J said the following:[23]

> Now, I think it is clear and Mr *Merber* does not contend to the contrary – that *prima facie* the demand which must be made in writing under section 12(b) must reach the buyer. The Legislature has given him ten days after the demand in which to comply with the demand and that means, I think, that the demand to be effective must be a demand which has reached the buyer.[24]

When the court considered the Hire-Purchase Act as amended post 1965 in the case of *Fitzgerald v Western Agencies*,[25] the court gave the first indication of the judicial status of the notices and its delivery. The court in *Fitzgerald* found that a notice which did not reach the buyer was still effective provided that, it had been sent in accordance with the Hire-Purchase Act. This decision was based on the amended section 12(b) to the Hire-Purchase Act. This important change came about as a result of the Hire-Purchase Amendment Act 30 of 1965.

The judge in the *Fitzgerald* case remarked that the change in the wording of section 12(b), to specify the various ways in which the notice could be delivered, clearly

[22] 1957 (1) SA 650 (WLD), hereafter referred to as the *Weinbren* case.
[23] *Weinbrein* case pg 651.
[24] Zondo AJ at paragraph 127 of the *Sebola* case agreed with the court in the *Weinbren* case.
[25] 1968 (1) SA 288 (T), hereafter referred to as the *Fitzgerald* case.

indicated the legislature's intention to do away with the requirement of receipt of the notice for it to be effective.[26]

2 3 The Sale of Land Act[27]

The Sale of Land Act came into effect on 1 January 1972[28] and applied to contracts of sale of land where the purchaser was a natural person. This Act did not apply where the purchaser was a juristic person or the state.[29]

The applicable section in the Sale of Land Act which dealt with the requirements which the credit provider had to adhere to prior to taking action against a credit receiver who failed to meet his contractual obligations, was dealt with in section 13(1). Section 13 (1) provided as follows:

> No seller shall, by reason of any failure on the part of the purchaser to fulfil an obligation under the contract, be entitled to terminate the contract or to institute an action for damages, unless he has by letter handed over to the purchaser and for which an acknowledgment of receipt has been obtained, or sent by registered post to him at his last known residential or business address, *informed*[30] the purchaser of the failure in question within a period stated in such demand, not being less than 30 days, and the purchaser has failed to comply with such demand.

From the provision above, it is clear that where the consumer had failed to perform an obligation in terms of a contract, the credit provider could only enforce the debt in question once he had

(a) informed the consumer of his failure to perform, by means of a letter; and
(b) required the consumer to carry out the specific obligation within a period of not less than 30 days.

[26] *Fitzgerald* case 369G.
[27] The Sale of Land Act was repealed by the Alienation of Land Act 68 of 1981, which is still applicable in South Africa.
[28] Deimont & Aronstam (1982) 365.
[29] S 2(a) and (b) of the Sale of Land Act.
[30] Emphasis supplied.

The letter mentioned in section 13(1) had to be delivered by means of one of the following two methods:

(a) The credit provider had to personally hand over the letter to the credit receiver and obtain an acknowledgement of receipt therefore.
(b) The credit provider could have sent the letter via registered post to the credit provider's last known residential or business address.

The court, when explaining the meaning of relevant sections in the Sale of Land Act, decided in *Maron v Mulbarton Gardens (Pty) Ltd,*[31] that the word "inform" in section 13(1) of the Sale of Land Act, suggested, without the Act directly expressing so, that the notice had to reach the purchaser.[32] The court went on to state that the method used by the credit grantor to inform the consumer should not be to the consumer's detriment. The consumer should, regardless of the manner in which the credit grantor sent the letter, have thirty days to remedy his breach.[33] The reasoning behind the decision in *Maron* was that where a credit provider sent a notice by mail instead of hand delivering the notice, the consumer who received the letter by mail would have been given less time to remedy his breach in comparison to the consumer who received his notice by hand. This could not have been the intention of the legislature.

In *Maharaj v Tongaat Development Corporation (Pty) Ltd*[34] the court was also confronted with the legal question on when the thirty day period began to run. The court of first instance held that the notice did not need to reach the consumer for it to be effective. However, when this decision was appealed against, to the Appellate Division (as it then was), the view that the notice must reach the purchaser was favoured by the appeal court. The court arrived at this decision without placing special importance on the meaning of the word 'inform'.[35] The decision of the court was based on the purpose of the thirty day period and the protection of the

[31] 1975 1 All SA 32 (W), hereafter referred to as the *Maron* case.
[32] *Maron* case 35.
[33] *Maron* case 35.
[34] *Maharaj v Tongaat Development Corporation 1976 4 All SA* 618 (A), hereafter referred to as the *Maharaj* case.
[35] *Ibid*.

consumer by section 13(1).[36] The court stated that the option of sending the letter by mail was only to make it convenient for the credit grantor but not to be to the detriment of the consumer. [37]

2 4 The Credit Agreements Act

Unlike the Sale of Land Act, which applied to credit agreements relating to immovable property, the Credit Agreements Act applied to credit agreements involving movable property.[38]

A "credit agreement" was defined in section 1 of the Credit Agreements Act as a credit transaction or leasing transaction. "A transaction, including an instalment sale transaction, in terms of which goods were sold by the seller to the purchaser against payment by the purchaser to the seller of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future" constituted a credit transaction.[39]

Like its predecessor[40] the Credit Agreements Act contained a clause dealing with the limitation of the credit grantor's right to enforce certain provisions of the credit agreement. The relevant section is section 11 which provided as follows:

> No credit grantor shall, by reason of the failure of the credit receiver to comply with any obligation in terms of any credit agreement, be entitled to claim the return of the goods to which the credit agreement relates unless the *credit grantor by letter, handed over to the credit receiver* and for which *an acknowledgement of receipt has been obtained or posted by prepaid registered mail to the credit receiver at his address stated in the credit agreement in terms* of section 5(1)*(b)* or the address changed in accordance with section 5(4), has notified the credit receiver that he so failed and has required him to comply with the obligation in question within such period, being not less than 30 days
> after the date of such handing over or such posting, as may be stated in the letter, and the credit receiver has failed to comply with such requirement: Provided that should the credit receiver have failed on two or more occasions to comply with obligations in terms

[36] *Maharaj* case 622.
[37] *Maharaj* case 621.
[38] Scholtz (2008) para 1.3.3.
[39] S 1.
[40] The Hire-Purchase Act.

> of any credit agreement and the credit grantor has given notice as aforesaid, the said period shall be reduced to 14 days.[41]

It must be pointed out that a notice in terms of section 11 was essential only if a credit grantor intended to recover goods to which the agreement related to, as a result of the credit receivers failure to carry out his obligations in terms of the agreement. The credit provider therefore had to notify the credit receiver of his failure to comply with his commitments and had to require the latter's compliance within a certain period.

It was mandatory that the notice should be in writing and had to contain the following information:[42]

(a) The nature of the credit receiver's breach of contract.
(b) The action that the credit receiver had to take to remedy the breach.
(c) The period within which the action stipulated in (b) above had to be taken.
(d) If the contract failed to contain a *lex commissoria* clause, a notice that the credit grantor would be entitled to cancel the agreement if the breach of contract was not remedied.

Notice in terms of section 11 had to be given to the credit receiver everytime the credit receiver committed a breach of contract and the credit grantor intended to recover the goods. However, section 11 contained the following proviso: in the event that two notices had previously been sent which resulted in the credit receiver rectifying his breach, the credit grantor was entitled to allow the credit receiver only fourteen days to rectify his breach if a third notice had to be sent.
The question arose whether it was a requirement for the consumer to actually receive the section 11 notice in order for the notice to be effective.

Grové and Otto[43] were of the view that if a notice was sent in the prescribed manner, that it was not necessary for such a notice to reach the consumer to be effective.

[41] Emphasis supplied.
[42] Grové and Otto (2002) 43-44.
[43] Grové and Otto (2002) 44.

Otto[44] made the following submission:

> It cannot be laid down as an absolute rule that the notice must under all circumstances reach the credit receiver. Where the credit grantor has meticulously followed the technical requirements of the section, even though the notice may not reach the credit receiver, unless the credit grantor is aware of the fact that the notice did not reach its destination, and is still capable of effecting postal or personal service thereof…all the law should expect of him is to act reasonably to bring the notice to the credit receiver's attention.

Flemming,[45] on the other hand, was of the view that non-receipt of the notice could only be overlooked where it is impossible for the credit grantor to deliver the notice.

The Full Bench of the Witwatersrand Local Division (as it then was) in *Marques v Unibank Ltd*[46] referred to the opinion of Otto, mentioned above, with approval. In the *Marques* case a notice was sent in terms of section 11 of the Credit Agreements Act but the letter was returned marked "unclaimed". It was also held that there would be compliance with the relevant notice in terms of the Credit Agreements Act if the notice was sent by registered mail to the *domicilium* address.[47] The court constructed its decision on the wording of section 11 which provided that "the consumer must be notified". The court therefore accordingly stated that the word "notify" meant "sending of a notice" while the word "inform" implied the "parting of knowledge".[48] The court made the further remark that if the legislature required proof of receipt, it would not have been essential to add the prerequisite that registered post be used.[49]

2 5 Conclusion

In the paragraphs above regard was had to the relevant provisions of the Hire-Purchase Act,[50] the Sale of Land Act[51] and the Credit Agreements Act[52]. A number of cases were considered as well.

---

[44] Otto (1991) para 29.
[45] Flemming (1982) 318.
[46] *Marques v Unibank Ltd* (2000) (4) All SA 146 (W), hereafter the *Marques* case.
[47] Van Heerden & Coetzee (2009) PER 333-360.
[48] *Marques* case 156.
[49] *Marques* case 153.
[50] Para 2 2 above.
[51] Para 2 3 above.

The conclusion is that when one contemplates on whether the notice preceding debt enforcement has to reach the consumer in order to be effective, the wording of the particular section is of fundamental importance. For example, section 12(b) of the Hire-Purchase Act made use of the word “inform” and the court interpreted it to mean that for the notice to be effective, the credit receiver had to receive it.[53] Likewise, the use of the word “inform” in section 13(1) of the Sale of Land Act was also interpreted by the court to necessitate actual receipt of the notice.[54] On the other hand, in the Credit Agreements Act the word “inform” was changed to “notify” and the court accordingly interpreted this to mean that actual receipt was not a requirement.[55]

[52] Para 2 4 above.
[53] The *Weinbren* case referred to in para 2 2 above.
[54] Para 2 3 above.
[55] Para 2 4 above.

3 The Meaning of the Phrase "Enforce" in terms of Sections 129 and 130 of the National Credit Act

3 1 Introduction

Section 129(1) constitutes the introduction to Part C of Chapter 6 of the NCA that deals with "Debt enforcement by repossession or judgment". Van Heerden and Boraine submit that section 129(1) is to be read with section 130, as these two sections "plays a pivotal role in the enforcement of credit agreements".[56] Due to the importance of these sections, they are quoted in full. Section 129(1) provides as follows:

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

Section 130 of the NCA states the following:

> Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and-
> (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9) , or section 129(1), as the case may be;
> (b) in the case of a notice contemplated in section 129(1), the consumer has-
> (i) not responded to that notice; or
> (ii) responded to the notice by rejecting the credit provider's proposals; and

[56] Van Heerden and Boraine (2011) *SA Merc LJ* 45.

(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

3 2 "Debt Enforcement" in relation to the Section 129(1)(a) Notice

As the section 129(1)(a) notice is relevant to debt enforcement proceedings, it is prudent to begin the discussion with an inquiry into the term "enforce".

The NCA, is silent on the meaning of the term "enforce" and deals vaguely with the exact nature of the term. The resulting consequence of this is that it has given rise to ambiguity and has rekindled a debate about the precise meaning of the term. The court in *ABSA Bank Ltd v De Villiers and another*[57] stated that "the use of confusing terminology by the legislature, particularly with regard to debt-enforcement procedures, tends to hamper the process of interpreting the relevant provisions of the NCA". Otto,[58] however, defines enforcement of a credit agreement as the exercise of remedies by the credit provider, including implementation of a *lex commissoria.*[59] Boraine and Renke, on the other hand, are of the view that "enforce" symbolizes all remedies available to a credit provider when he approaches a court for relief or an appropriate order.[60]

The ordinary meaning of "enforce", in legal parlance, particularly in a contractual setting, would be the act of compelling a party to satisfy an obligation or comply with an agreement. On the other hand, the use of the word "terminate", presents circumstances in contrast to this and conveys the legal concept of extinguishing contractual obligations.[61] It is therefore challenging to grasp how, as a matter of law, a credit agreement can be terminated and enforced simultaneously.

If the word "enforce" in section 129(1)(b) were to be interpreted narrowly, and its scope of meaning limited to the enforcement of a contractual obligation, it would

[57] 2009 (5) SA 40 (C), hereafter referred to as *De Villiers* case.
[58] Otto (2006) 87.
[59] *Lex Commissoria* is a clause in a contract which entitles a party to cancel a contract on account of the other party's breach of contract.
[60] Boraine and Renke (Part 2) (2008) *De Jure* 2.
[61] *De Villiers* case para 11.

follow that where a consumer is in default and the credit provider wishes to invoke the more serious remedy of cancellation, it would not be necessary for the credit provider to comply with the notice provision and other requirements detailed in sections 129(1)(a) and 130. As stated by Otto, to suggest this would jettison the governing jurisprudence on the subject, and would surely go against the declared purpose of the NCA which is to protect the consumer.[62] The objective of the NCA is to provide wider protection to the consumer.[63]

Otto's view that the legislature has used the word "enforce" in a wide sense, namely the exercising of any of its remedies by a credit provider, was confirmed in the *De Villiers* case.[64] Words must take their colour, like a chameleon from their setting and surrounds in the NCA. The use of the words "enforce" and "terminate" in section 123(2), in describing the steps which a credit provider may take in terms of Part C of Chapter 6 of the NCA,[65] further indicate that enforce should be widely cast to be given a meaning that was congruent with the language of the NCA, having regard to its object and purpose.

In *Nedbank v National Credit Regulator* [66] the court was of the view that the word "enforce" includes a reference to all contractual remedies, which would include cancellation and ancillary relief. In addition thereto, it would also include enforcement of those remedies through judicial means.[67]

3 3 Conclusion

From the various court decisions and the opinions of the authors referred to above, it is clear that the word "enforce" cannot be interpreted in the narrow sense. If this was the case, credit providers could choose a remedy which would not necessarily require compliance with section 129. This could in all possibility lead to exploitation to the detriment of the credit receiver. Therefore, it is submitted that "enforce" refers

[62] Otto & Otto (2013) 113.
[63] Otto & Otto (2013) 113.
[64] *De Villiers* case para 13.
[65] *Ibid.*
[66] 2011 (3) SA 581 (SCA), hereafter referred to as the *National Credit Regulator* case.
[67] *National Credit Regulator* case para 12.

to the typical civil procedure enabling one to approach a court for an order for suitable relief in the case where breach of contract was committed.

4 Is Compliance with Section 129(1)(a) a Prerequisite for Debt Enforcement?

4 1 Introduction

Section 129(1) prescribes the required preliminary steps that a prospective litigant must take prior to instituting an action to enforce a debt regulated by the NCA. In this paragraph the writer methodically investigates section 129 of the NCA to ascertain whether compliance with section 129(1)(a) is a pre-enforcement requirement. The purpose of the notice is also considered.

4 2 The Purpose of the Section 129(1)(a) Notice

Section 129(1)(a) of the NCA provides that if a consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor,[68] alternative dispute resolution agent,[69] consumer court[70] or ombud with jurisdiction,[71] with the intent that the parties resolve any dispute or alternatively develop and agree on a plan to bring the payments under the agreement up to date.

Van Heerden and Boraine[72] thus submit that the purpose of the section 129(1)(a) notice is to present a consumer with certain alternatives which he may consider prior to debt enforcement. If these alternatives are successful, it would circumvent the need for costly and often lengthy litigation. The authors[73] go further by stating that if a section 129(1)(a) notice is not sent, it would defeat the purpose of possibly avoiding litigation.

---

[68] "Debt counsellor" is not defined in the Act, however, reg 1 of the regulations published in GN R489, *Government Gazette* 28864, 31 May 2006 defines it to mean a neutral person who is registered in terms of s 44 of the Act offering a service of debt counselling. Reg 1 defines the concept "debt counselling" as meaning the performance of the functions contemplated in s 86.

[69] Alternative dispute resolution agent is defined in s1 of the Act as "a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration".

[70] S 1 of the Act states that a consumer court means "a body of that name, or a consumer tribunal, established by provincial legislation".

[71] S1 states that "ombud with jurisdiction" in respect of any particular dispute arising out of a credit agreement in terms of which the credit provider is a "financial institution" as defined in the Financial Services Ombud Schemes Act 37 of 2004, means an "ombud", or the "statutory ombud", as those terms are respectively defined in that Act, who has jurisdiction in terms of that Act to deal with a complaint against that financial institution.

[72] Van Heerden & Boraine (2011) *SA Merc LJ* 52.

[73] Van Heerden & Boranine (2011) *SA Merc LJ* 52.

The purpose of the section 129(1)(a) notice was also fully discussed in the *National Credit Regulator*[74] case. The court stated that one of the objects of the NCA is to provide a "consistent and accessible system of consensual dispute resolution". The court went further by stating that the purpose of a section 129(1)(a) notice is "the resolution of a dispute and the bringing up to date of payments under a specific credit agreement". The section 129(1)(a) notice therefore seeks to bring about a consensual resolution under one credit agreement.[75]

4 3 Is Compliance with the Section 129(1)(a) Notice Mandatory?

4 3 1 Introduction

The purpose of section 129 was already alluded to above. Therefore, the use of the word "may" in section 129(1)(a) is misleading and gives the impression that a credit provider has the freedom to decide whether or not a default notice in terms of section 129(1)(a) should be sent to the defaulting debtor. Otto and Otto[76] are of the view that the word "may" actually means "must".

In what follows the question will be answered whether or not the section 129(1)(a) notice is compulsory for debt enforcement purposes.

4 3 2 Section 129(1)(a) read with Section 130(1)

Section 129(1)(a) of the NCA plays a pivotal role in the enforcement of credit agreements. Section 129(1)(b), read together with section 130(1) and 130(3)(a) of the Act, essentially compels a credit provider to deliver a notice in terms of section 129(1)(a) to the consumer prior to enforcement of a credit agreement to which the NCA applies. These provisions are cast in mandatory terms.[77] Furthermore, it can be said that fulfilment of the procedure mentioned in section 129(1)(a) can be seen as the first step for prospective litigants or rather the "gateway" or "trigger" to debt enforcement litigation.[78]

---

[74] Para 14.
[75] *National Credit Regulator* case, para 9.
[76] Otto and Otto (2013) 113.
[77] Van Heerden & Borraine (2011) *SA Merc LJ* 1.
[78] *Ibid*.

The delivery of a section 129(1)(a) notice is a mandatory procedural step which was designed by the legislature to promote the idea of solving differences between the parties before seeking court intervention.[79] Compliance with a section 129(1)(a) notice is a precondition to the initiation of legal proceedings. It is thus submitted that if a credit provider has not sent a notice in terms of section 129 to a consumer who is in default, proposing that he refers his credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombudsman, with the intention of resolving the dispute or agreeing on a plan to bring the payments up to date, the credit provider is not entitled to enforce the credit agreement.

Van Heerden and Boraine state that when section 129(1)(a) is read with sections 129(1)(b) and 130(1),[80] it becomes clear that compliance with section 129(1)(a) is unavoidable. These provisions are cast in mandatory terms and indicate the necessity of compliance with section 129(1)(a) prior to debt enforcement.[81] This, after having regard to the object and purpose of the NCA, is in line with the overall purpose of the NCA, namely, to present a consumer with certain alternatives that he or she may consider prior to debt enforcement, in order to deal with the debt.

The court in the *De Villiers*[82] case held, and in doing so confirmed that section 129(1)(b) provides that the credit provider may not initiate any legal proceedings to enforce the credit agreement before complying with not only the notice requirement of section129(1)(a), but also the requirements of section 130.

Moreover, in *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors*,[83] the court held the aforementioned notice is a *sine qua non* for the enforcement of a debt. Additionally, the court in *Standard Bank of SA Ltd v Van Vuuren*[84] referred to the section 129(1)(a) notice as a "mandatory requirement".

[79] *First Rand Bank Ltd v Olivier* 2009 (3) SA 353 (SEC) 360D-E.
[80] See para 3 1 above.
[81] Van Heerden & Borraine (2011) *SA Merc LJ* 52.
[82] *De Villiers* case para 12.
[83] 2009 (2) SA 512 D para 55, hereafter the *Proschaska* case.
[84] 2009 (5) SA 557 (T) 562 C.

Thus, this string of judgments developed a settled principle that the creditor is obliged to follow the step in section 129(1)(a) before commencing enforcement and it has thus become clear and unequivocal. This was eventually confirmed by the Supreme Court of Appeal in *Nedbank v NCR*.[85]

The solitary instance wherein a credit provider is exempted from sending a section 129(1)(a) notice is when a debt-restructuring order is already in place and the consumer defaults in terms of the order.[86] Section 129(2) of the NCA provides that a credit provider may enforce a credit agreement without sending the aforementioned notice if the credit agreement is subject to a debt-restructuring order, or subject to proceedings in court which could result in such an order.

4 4 The Implications of Non- Compliance with Section 129

The purpose of this discussion is to investigate the scope of the court's powers in the event of non-compliance with section 129(1)(a).

Kelly-Louw and Stoop [87] state that where a court determines that a credit provider has not complied with the provisions of section 129, such failure shall not automatically invalidate the summons or application. Section 130(4)(b) of the NCA states that where a court finds that the credit provider has not complied with the relevant provisions of the Act, the court must adjourn the matter and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed. This was confirmed in the *Sebola* case.[88]

The Natal Provincial Division issued a rule of practice[89] which requires the Plaintiff to allege in the summons that the provisions of section 129 have been complied with. A certificate indicating compliance with the said section must be attached to the summons. Furthermore, the Cape Provincial Division also issued a practice note[90] requiring that the Plaintiff insert an allegation of compliance with section 129 in the

[85] *National Credit Regulator* case, para 8.
[86] Coetzee LLM Dissertation (2009) 55.
[87] Kelly-Louw & Stoop (2012) 409.
[88] *Sebola* case, para 87.
[89] Natal Provincial Division rule of practice 28.
[90] Cape Provincial Division practice note 25.

summons or particulars of claim. In addition thereto, the practice note also calls for an affidavit satisfying the court that the requirements have been met when applying for judgment.

In the *Prochaska* case[91], the court confirmed that the onus rests on the credit provider to establish that it had complied with the requirements of section 129(1)(a) and (b).

Erasmus and Van Loggerenberg allege that compliance with section 130 is a jurisdictional factor that must be present before the matter may be determined.[92] Furthermore, they go on to state that the credit provider would have to show compliance by means of "credible testimony" before the matter may be determined and that the onus would be on the consumer to rebut the credit provider's evidence. This approach is also in line with the practice note which was issued by the Cape Provincial Division.

4 5 Conclusion

In the preceding sub-paragraphs the writer considered the views of various authors as well as case law to answer the question on whether compliance with the section 129(1)(a) notice is a prerequisite for debt enforcement.

From the above it is evident that the section 129(1)(a) notice is compulsory. It is likewise submitted that the proposals contained in the section 129(1)(a) notice are offers by the credit provider to the consumer to consult with third parties to resolve disputes and bring payments up to date and not merely proposals to apply for debt review. As such, it may be said that the section 129(1)(a) notice should be sent to all consumers to whom the NCA applies, prior to debt enforcement, even to those consumers who cannot apply for debt review.[93]

[91] Para 57.
[92] Coetzee LLM Dissertation (2009) 80.
[93] Example, juristic persons.

5 The Content of the Section 129(1)(a) Notice and the Time Limits Involved

5 1 The Content of the Section 129(1)(a) Notice

5 1 1 Introduction

As no specific format or form is stipulated in the Act and the regulations similarly remain silent on a form or format for a section 129(1)(a) notice, in what follows the views of authors and court decisions as to the form and format of the section 129(1)(a) notice will be considered.

5 1 2 Information to be Included in the Section 129(1)(a) Notice

Van Heerden and Borraine state that the section 129(1)(a) notice can be incorporated into a letter of demand. However, the section 129(1)(a) notice is the equivalent of a letter of demand with additional provisions and is the starting point of enforcement procedures.[94] According to Van Heerden and Otto, the notice should indicate that debt enforcement would follow in the event of the debtor failing to respond, or responding with a rejection of the proposals made in the notice.[95]

In Dwenga v First Rand Bank Limited[96] the court stated that sufficient information regarding the default, alleged breach and consequences should be stated in the notice.

The section 129(1)(a) notice must contain an explicit reference to the ten business day time period in which the debtor can respond and the further time period of being in default for a period of twenty business days to enforce the credit agreement before summons may be issued.[97]

[94] Van Heerden & Boraine (2011) *SA Merc LJ* 51.
[95] Van Heerden & Otto (2007) *TSAR* 666.
[96] [2011] ZAECELLC 13, hereafter the *Dwenga* case.
[97] Van Heerden in Scholtz (ed) (2009) 12.4.9.

It would appear that the logical conclusion to draw from the above is that the credit provider issuing a section 129(1)(a) notice should go further than merely complying with the wording of the section.

In the matter of *BMW Financial Services (South Africa) v Dr M B Mulaudzi Inc,*[98] the court followed the approach that the notice did not only have to comply with the aforementioned requirements, but that the notice should go further in informing the debtor. The court was of the view that credit providers should not just merely reproduce section 129(1)(a) of the Act in the notice, but that the notice should be made understandable and practical to the debtors. The court put it as follows:

> A message to the effect that, if the debtor cannot cope with the current instalment, he/she should approach the credit provider or a credit counsellor to talk about what could be done to prevent drastic action like repossession and a lawsuit being taken against it/him/her, would possibly be considered more as a proposal than the mere regurgitation of a portion of s129(1)(a). [99]

The court indicated that it would not suffice to merely duplicate the wording of the section, but that it is required that "flesh" be added to the wording of section 129(1)(a) in order to make it understandable to the consumer.[100] Otto and Otto[101] do not agree with the courts view in the *Mulaudzi* case. They express the opinion that the courts view is commendable, but that courts should not expect too much of credit providers in this regard. Otto and Otto go on to say that the NCA is an extensive piece of legislation with detailed regulations. Therefore, if the legislature wanted to put "flesh or substance" to section 129(1)(a), it could simply have regulated the matter in the section itself or in the regulations to the NCA. Otto and Otto, however, states that credit providers should caution consumers of the consequences of ignoring a section 129(1)(a) notice.

Van Heerden and Otto, on the other hand, are of the view that it is not sufficient to merely deal with the default and proposal components in the section 129(1)(a) notice, but that the notice should indicate to the consumer that debt enforcement will

[98] 2009 (3) SA 348 (Bop), hereafter referred to as the *Mulaudzi* case, para C.
[99] *Mulaudzi* case para C.
[100] Stander LLM Dissertation (2012) 32.
[101] Otto & Otto (2013) 2012.

follow should the consumer fail to respond to the notice or reject the proposal contained therein. Van Heerden and Otto further submit that, in the event of a consumer defaulting, the credit provider may incorporate a section 129(1)(a) notice into a letter of demand.[102]

Van Heerden and Otto[103] are of the view that the section 129(1)(a) notice should be formatted and phrased as follows:

> Mr/ Ms Consumer
>
> (Address as per credit agreement or as changed in terms of section 96 (2))
>
> Account number……..
>
> Notice in terms of section 129(1)(a) of the National Credit Act 35 of 2005
>
> In terms of section 129(1)(a) of the National Credit Act 43 of 2005, your attention is hereby drawn to the fact that you are in default with your obligations under the credit agreement (account number……) that you entered into with (specify credit provider) in the amount of R…… (or specify if default does not relate to arrears).
>
> It is proposed that you refer the above credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court, or ombud with jurisdiction with the intent
>
> To resolve any dispute under the agreement
>
> Or
>
> To develop a plan, to be agreed upon with (specify credit provider), to bring the payments under the agreement up to date.
>
> Should you fail to respond to this notice within 10 (ten) business days from delivery hereof by either rejecting the aforesaid proposal or by failing to respond to this notice at all and should you remain in default with your obligations as aforesaid for a period of 20 (twenty) days since your default commenced the credit agreement may be cancelled and (specify credit provider) will proceed with legal steps to enforce the agreement.

[102] Note that a section 129 (1)(a) notice is not a demand in the nature of a section 11 letter sent in terms of the repealed Credit Agreements Act.
[103] Van Heerden & Otto 2007 *TSAR* 666.

5 2 The Time Limits Applicable to the Section 129(1)(a) Notice

5 2 1 Introduction

Section 130 of the NCA is titled "Debt procedures in a Court". Coetzee[104] submits that prospective litigants will have to take cognisance and comply with section 130 prior to actually reaching the stage where a court will hear a particular matter.

This paragraph investigates the prescribed time periods as stipulated in section 130(1)(a) and (b) and the allegations to be made in the pleadings to prove that the credit provider complied with the prescribed time periods.

Section 130(1)(a) provides that a credit provider may approach a court for an order to enforce a credit agreement only if on that date[105] the consumer has been in default for a period of at least twenty business days[106] and at least ten business days have elapsed since the credit provider delivered a section 129(1)(a) notice[107] to the consumer. Furthermore, in terms of section 130(1)(b), enforcement proceedings may only commence in the event that the consumer has not responded to the section 129(1)(a) notice, or responded by rejecting the proposals contained therein.

The question thus arises on whether the ten business day period and the twenty business day period may run concurrently.

Van Heerden and Otto[108] submit that the ten business day delivery period and the twenty business day default requirements may run concurrently. Bearing this in mind, the consumer will, as a result, have a minimum of twenty business days, since going into default in terms of the credit agreement, to utilize the rights, which have

---

[104] Coetzee LLM Dissertation (2009) 87.
[105] The day of issuing of summons to enforce the debt in court.
[106] S 2(5) of the NCA defines business days and provides as follows:
"When a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by –
(a) Excluding the day on which the first such event occurs;
(b) Including the day on by which the second event is to occur; and
(c) Excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b) respectively".
[107] Or a section 86(10) notice. This type of notice is not addressed.
[108] Van Heerden & Otto (2007) *TSAR* 662.

been brought to the consumer's attention, before the credit provider may commence enforcement proceedings. It is interesting to note that twenty business days is approximately 28 calendar days, which is close to the 30 business day provision provided for in terms of section 11 of the Credit Agreements Act.[109]

The twenty business days are triggered by going into default, whereas the ten business days are triggered by the delivery of the section 129(1)(a) notice. By delivering the section 129(1)(a) notice soon after default has occurred, the credit provider or his legal representative can ensure that the two time periods run concurrently.

5 3 Conclusion

It can thus be deducted from the above discussion that a notice in terms of section 129(1)(a) is not just a letter of demand in the ordinary sense of the word. It is a notice which not only informs the credit receiver of his default, but also provides him with options on how to resolve an issue, if any, (without necessarily resorting to litigation) within a certain time period. It is also clear that depending on the facts, the soonest that a credit provider will be able to enforce a credit agreement is twenty business days since the default has occurred.

[109] Van Heerden & Otto (2007) *TSAR* 662.

6 Must the Section 129(1)(a) Notice Reach the Consumer in order to be Effective?

6 1 Introduction

As indicated above[110], it is trite law that a section 129(1)(a) notice is mandatory and must be sent to the consumer prior to enforcement of a credit agreement to which the NCA applies. The debate, however, is whether the section 129(1)(a) notice must reach the consumer in order to be effective.

As discussed in paragraph 2 above, it is apparent that this is not a new issue. Section 11 of the Credit Agreements Act, the NCA's immediate predecessor, required that a credit grantor had to "notify" the credit receiver of his failure to comply with his obligations in terms of the credit agreement and to demand compliance. Notification was by means of a letter, which was either hand delivered or sent by registered mail to the credit receiver's chosen *domicilium citandi et executandi*.[111] Dispatching the notification by hand resulted in the default notice coming to the attention of the credit receiver, as the credit receiver had to acknowledge receipt of the notice. However, by posting the letter or notice by registered mail, one did not always have this desired result. Thus, already under the Credit Agreements Act, the question on whether the default notice had to come to the attention of the credit receiver in order to be effective was posed.

The problem in terms of the NCA is that section 129(1)(a) does not state how the notice should be brought to the consumer's attention. In section 130(1), which has to be read and complied with in conjunction with section 129(1)(a), the word "delivered" is used. However, the word "delivered" is not defined in the Act. This gave rise to diverging court decisions which are discussed later.[112]

6 2 The Provisions of the NCA

[110] See Para 4 above.
[111] S 5(4).
[112] Para 6 3 below.

Boraine and Renke submitted that the section 129(1)(a) notice should be delivered in terms of section 65(1).[113] Section 65 of the NCA deals with the right to receive and deliver documents and provides as follows:

> 65 Right to receive documents
>
> (1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.
>
> (2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must-
>
> (a) make the document available to the consumer through one or more of the following mechanisms -
>
> (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;[114]
>
> (ii) by fax;
>
> (iii) by email; or
>
> (iv) by printable web-page; and
>
> (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).

When having regard to the construction of the section, the remaining mechanisms of "delivery" present no difficulty of interpretation and merely list the alternatives such as "by fax, by email or by printable webpage" and to deliver it in a manner chosen by the consumer. However, delivery via mail causes uncertainty as delivery by means of ordinary mail provides no proof of delivery.

However, Chabala[115]suggests that it is advisable for the credit provider to make use of registered post or certified mail should he need to provide proof of delivery during litigation proceedings.

Section 168 of the NCA deals with the serving of documents, and provides as follows:

---

[113] Boraine & Renke (Part 2) (2008) *De Jure* 5.
[114] The Constitutional Court confirmed in the *Rossouw* case at [29 -30], that section 65(2) also covers delivery per registered mail, Maya JA (Registered mail is a more reliable means than ordinary mail).
[115] Chabalala LLM Dissertation (2014) 34.

> 168 Serving of Documents.
> Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either -
> (a) delivered to that person; or
> (b) sent by registered mail to that person's last known address.

This section, which concerns itself with the "serving of documents" states clearly or as a rule that the documents "must" be "served" and that it will be properly served when it has been "delivered" to that person or "sent by registered mail to that person's last known address". The Act does not define the word "served" and the section goes no further than saying that "delivered" or "sent" to the last known address constitutes proper service. The author observes that section 168 does not state that the consumer must designate the location and as a result does not extend the right to elect the location of the delivery. It goes no further than instructing the credit provider to send the documents to the last known address of the consumer. It is prudent to assume that the timeframe when the last known address was obtained must be reasonable and that an unreasonable period since the address was last updated would not constitute "properly served". Gautschi AJ stated that this is the closest that one comes to a "prescribed manner"[116] of delivery of a document to a consumer.[117]

6 3 Analysis of court decisions

6 3 1 Introduction

On the authority of the judgments *Marimuthu Munien v BMW Financial Services (SA) (Pty) Ltd* [118] and *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors*[119] there exists a conflict on the interpretation of section 129 and the meaning of the term "delivered".[120]

---

[116] The words used in S 65(1).
[117] *Starita v Absa Bank Limited and Another* (745/2009) [2010] ZAGPJHC 13. [18.5].
[118] *Munien v BMW Financial* Services (SA) (Pty) Ltd & Another [2009] JOL 23387 (KZD), hereafter the *Munien* case.
[119] *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D & CLD).
[120] *Standard Bank of South Africa Ltd v Rockhill and Another* 2010 (5) SA 252 (GSJ) (provision does not require proof of receipt, but only dispatch to postal address selected by consumer); *Firstrand Bank Ltd v Dhlamini* 2010 (4) SA 531 (GNP) (more than mere dispatch required: proper notice

In *Munien* the essential question that had to be addressed was whether a section 129(1)(a) notice was deemed to be delivered[121] if it was sent by registered post to an address selected by the consumer, irrespective of whether it was capable of being delivered to that address and the timing when it came to the attention of the consumer.[122] Wallis J [as he then was] rejected the contention that the section 129(1) notice had to come to the attention of the consumer and held that a notice is delivered if it is sent by registered post to an address selected by the consumer, irrespective of whether it comes to the attention of the consumer. The judge's ruling was predicated upon his interpretation and understanding of the word "delivered" in section 130(1)(a) of the Act.[123]

Seemingly in contrast to the above, in *Prochaska* Naidu AJ expressed the following view:[124]

> [54] In my view the present Act, with regard to the notice contemplated in section 129(1)(a) thereof, represents a radical departure from its predecessor. Whereas the Credit Agreements Act 75 of 1980 merely requires the credit receiver (sic - should be "grantor") to post by prepaid registered mail and, in this way, "has notified the credit receiver" of default, the present Act in section 129(1)(a) creates an obligation on the credit provider (when it decides to take such a course) to draw the default to the notice of the consumer in writing. Section 129(1)(b) creates a bar against the credit provider legitimately commencing any legal proceedings to enforce the agreement before *providing notice* to the consumer as contemplated in section 129(1)(a). In terms of

---

involving personal service drawing the notice to the consumer's actual attention is necessary); *Starita v ABSA Bank Ltd and Another* 2010 (3) SA 443 (GSJ) (provision does not require proof of receipt of notice by consumer, but only dispatch to exact address chosen by consumer); *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD) (delivery is effected by dispatch, hence mere proof of posting by registered post is sufficient); *Standard Bank of South Africa Ltd v Mellet and Another* [2009] ZAFSHC 110 (actual receipt not required); *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D&CLD) (more required than mere dispatch).

[121] The Munien-judgment was approved in the unreported Eastern Cape High Court decison of *Firstrand Bank v Bernardo* Case no 608/09, the court agreeing with the *dicta* of Wallis J in *Munien* where the court added that by virtue of the definition of "served" in s 7 of the Interpretation Act 33 of 1957, 'delivery' of the s 129 notice does not mean that it has to be received by the defendant. The *dicta* was also met with further approval in the unreported case of *ABSA Bank Limited v Kritzinger* case no 6474/2009 in the Western Cape High Court.

[122] Van Heerden & Coetzee (2009) *PELJ* 348.

[123] *First Rand Bank Limited v Dhlamini (50146/09) [2010] ZAGPPHC 25*; 2010 (4) SA 531 (GNP) (17 March 2010) para 13.

[124] *Prochaska* case paras 54 - 55.

> section 130(1)(a) a credit provider may only approach a court for an order to enforce a credit agreement if, inter alia, at least ten business days have elapsed since a credit provider *delivered* a *notice,* as contemplated in section 129(1)(a), to the consumer
>
> [55] The words 'draw the *default to the notice of the consumer*', *'providing notice'* and *'delivered a notice'* in the context in which these appear in the previous paragraph to my mind cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires much more than the mere dispatching of the notice contemplated by section 129(1)(a) to the consumer in the manner prescribed in the Act and the regulations. The credit provider is required, in my view, to bring the default to the attention of the consumer in a way which provides an assurance to the court that the default has indeed been drawn to the notice of the consumer.

The *Munien* and *Prochaska* cases gave rise to conflicting interpretations of the word "delivered" and of the question whether the section 129(1)(a) notice must reach the consumer to be effective.[125] This caused the Supreme Court of Appeal decision in *Rossouw v Firstrand Bank Ltd*.[126]

6 3 2 *Rossouw and Another v Firstrand Bank Ltd*

In *Rossouw*, the bank sought summary judgment against a couple who had defaulted on their mortgage bond repayments. In their bond agreement the couple chose delivery by registered post at the mortgaged property as a means of service of any notice. Their defence to the bank's application for summary judgment included that they had not received the statutory notice. The court stated that the "heart of the issue is the precise method of delivery of the notice contemplated in section 129(1)(a) and whether it is necessary that it is actually received by the consumer".[127] Resolving the conflict between High Court judgments, the Supreme Court of Appeal found that section 129 did not require the credit provider to prove that the consumer had received the notice – proof of dispatch to the consumer's chosen address was sufficient.[128]

[125] Fn 120 & 121 above.
[126] 2010 (6) SA 439 (SCA), hereafter the *Rossouw* case.
[127] *Rossouw* case para 21.
[128] Para 32.

The court went on to state that even though registered mail is not one of the prescribed methods as listed in section 65(2)[129] it could not harm either party's interest if the notice was sent by registered mail.[130] In fact, the court held, it is a more reliable method of delivery than delivery per ordinary mail.

The court went further and remarked that the fact that the legislature grants to the consumer the right to choose the manner of delivery points to an intention to place the risk of non-receipt of the notice on the consumer's shoulders.[131]

It is at this point appropriate to indicate that *Rossouw* provided much needed certainty on the vexed interpretational issue of the delivery of the section 129(1)(a) notice. This, however, was shortlived.

6 3 3 *Sebola and Another v Standard Bank of South Africa Ltd and Another*[132]

In the *Sebola* case the judgment overturned the earlier *Rossouw* decision.[133]

The *Sebola* judgment was handed down on 7 June 2012 in the Constitutional Court by Cameron J. This judgment was foreshadowed by decisions in the South Gauteng High Court, which in the first instance was heard and delivered by a single judge and then an appeal to the full bench of that same court. The High Court had to deal with the question of whether or not a section 129(1)(a) notice read with section 130 of the NCA requires that a defaulting consumer should actually receive the notice.[134]

The background to the *Sebola* judgment is as follows: Mr and Mrs Sebola signed a mortgage home loan agreement with Standard Bank, which the Bank secured with a mortgage bond over the Sebolas' home. The Sebolas' elected the address of the mortgaged property as the one to where notices and documents "in any legal

[129] See para 6 2 above.
[130] *Rossouw* case para 9.
[131] Rossouw case para 22.
[132] 2012(5) SA 142 (CC), hereafter referred to as the *Sebola* case.
[133] Discussed in para 6 3 2 above.
[134] *Sebola* case para 1.

proceeding" were to be served, and they declared that "letters, statements and notices may be delivered" to a post office box in North Riding.[135]

The Sebolas' defaulted on their mortgage home loan agreement in 2009 by falling into arrears with their monthly bond repayments. The Bank sent a notice of default as required by section 129(1)(a) of the NCA by registered post to the specified post office box in North Riding on 16 March 2009.[136] A summons was subsequently issued on 25 May 2009 in the South Gauteng High Court for the full outstanding amount of R1 156 092.30 including costs and interest.[137] The Sheriff confirmed on the return of service that the summons had been served on 27 May 2009 by affixing a copy to the Sebolas' front door, which was the chosen *domicilium*. The Registrar of the South Gauteng High Court granted default judgment against the Sebolas.[138]

The Sebolas' formulated their application for rescission of the default judgment, by stating that they had not received the section 129(1)(a) notice or the summons issued by the Bank.[139] They testified to this effect by attaching a post office "track and trace" record to their application that reflected that the notice had been received by the Halfway House post office instead of the North Riding post office.[140] Therefore the notice was delivered to the wrong post office by the postal services and the Sebolas could by no means have received the notice. In the *court a quo* Blieden J, sitting alone, dismissed the application for rescission with costs.[141]

The matter was then heard on appeal before the full court and the judges found themselves bound by *Rossouw* and found that the court had authoritatively decided that the credit provider's mere sending of the notice by registered post to the address chosen in the mortgage bond constitutes compliance with the Act. The appeal was

---

[135] *Idem* para 4.
[136] *Idem* para 5.
[137] *Idem* para 6.
[138] This default judgment was granted prior to the Constitutional Court judgment in *Gundwana v Steko Development 2011 3 SA 602 (CC) w*here it was held that judicial oversight is necessary where an application is made for a sale in execution of mortgage property against a judgment debtor's primary residence. A court may (discretionary) grant such an order only after all the relevant circumstances of the debtor have been taken into consideration.
[139] *Sebola* case para 9.
[140] *Idem* para 5.
[141] *Idem* para 10.

dismissed with costs.[142] The matter thereafter served before the Constitutional Court for decision.

The Constitutional Court in *Sebola* held:

(a) Non-compliance with the requirements of section 129(1)(a) notices will not be fatal, but will only delay court proceedings.
(b) Dispatch of a section 129(1)(a) notice by registered mail to a specified address is required for delivery in terms of section 130(1)(a).[143]
(c) To comply with the requirements of these sections, more than mere "dispatch" of the notice is necessary. Noting the high importance attached to a section 129(1)(a) notice, the judge held that for a section 129(1)(a) notice to be effective, the credit provider should take reasonable measures to bring the notice to the attention of the consumer.[144]
(d) The credit provider must therefore present proof that the notice "on a balance of probabilities reached the consumer".[145]
(e) The credit provider must provide proof that the notice was delivered to the correct post office,[146] meaning that a credit provider will have to acquire a post-dispatch "track and trace" print-out from South Africa's Post Office website.[147]
(f) The credit provider's summons or particulars of claim must declare that the notice was delivered to the applicable post office and that the notification slip was delivered to the consumer. A notification slip informs a consumer that a registered item was received for his collection.[148]
(g) If in contested proceedings the consumer avers that the notice -notification slip - did not reach and was not received by him, the court must establish the truth of the claim, regardless of the credit provider's proven averments, if the consumer's statement could be true, in which case the court proceedings must be suspended.[149]

[142] *Idem* para 14.
[143] *Sebola* case para 68.
[144] *Idem* para 74.
[145] *Idem* para 75.
[146] *Ibid.*
[147] *Idem* para 76.
[148] *Idem* para 77.
[149] *Idem* para 87.

(h) The bank delivered the notice to the Sebolas' North Riding post office, complying with the mortgage agreement. However, it had the added obligation of proving that the notice had actually been received by the correct post office.[150]

(i) The bank was unable to satisfy the burden of proving the aforementioned, consequently the court rescinded the judgment against the Sebolas and the court proceedings were suspended until the bank corrected its omission.[151]

According to Van Heerden and Coetzee, the Constitutional Court, in adopting the purposive interpretation, or at least attempting to, went too far and arbitrarily expanded the credit provider's burden of proof, with the additional compliance requirement of the section 129(1)(a) notice.[152] The court created the opportunity for consumers to avoid receipt of the section 129(1)(a) notice, and as a result also either delay proceedings or to avoid enforcement altogether.[153]

The majority judgment in *Sebola* introduced a fresh interpretation on the section 129(1)(a) notice requirement which eliminated the certainty created by the *Rossouw* case. This was evidenced by the fact that after the *Sebola* case divisions of the High Court gave contradictory judgments on the notice requirement in terms of section 129(1)(a).[154]

6 3 4 *Nedbank Ltd v Binneman*[155]

In the *Binneman* case the section 129(1)(a) notice, was dispatched and did reach the correct post office, but was subsequently returned to sender.[156] The question arose on whether, in these circumstances, the credit provider is entitled to default judgment, assuming the papers are otherwise in order.[157] The Western Cape High Court in *Binneman* concluded that where there was proof that the notice reached the

[150] *Idem* para 81.
[151] *Ibid.*
[152] Van Heerden & Coetzee (2012) Litnet 256.
[153] Van Heerden & Coetzee (2012) Litnet 256.
[154] *Idem* 255.
[155] 2012 (5) SA 569 (WCC), hereafter referred to as the *Binneman* case.
[156] *Idem* para 2.
[157] *Ibid.*

correct post office, the risk of non-receipt of the notice rested with the defaulting consumer.[158]

The Western Cape High Court adopted this view upon reasoning that the Constitutional Court, in *Sebola* did not overrule the earlier Supreme Court of Appeal decision of *Rossouw* in which the court concluded that proof of sending the notice was sufficient.[159] Griesel J in the *Binneman* case referred to the interpretation of section 129 and section 130 by Wallis J [as he then was] in the *Munien*[160] case, which was that where the consumer had a right to choose the mechanism of delivery, it is for the consumer to ensure, with reasonable certainty, that this method would bring the notice to his attention. [161]

The above discussion from *Rossouw*, was referred to with approval, in the more recent decision of *Majola v Nitro Securitisation*[162] where the notice was sent to the *domicilium* of the consumer and the fact that he never received it did not render the notice invalid and the issue of summons was not premature. There was thus proper service of the section 129 (1)(a) notice on the creditor.[163]

Griesel J, after canvassing the above passages and citing them at length in the *Binneman* judgment, stated that the majority in *Sebola* cannot be interpreted as overruling these principles and that the *Sebola* judgment in fact only clarifies that "dispatch" alone is insufficient. There must, in addition, be proof that the notice did in fact reach the appropriate post office.[164] This judgment, however, failed to clearly identify why the court was of the view that the Constitutional Court in *Sebola* did not overrule the reasoning adopted in the *Rossouw* case.

6 3 5 *ABSA Bank Ltd v Mkhize*[165]

[158] Paras 4 and 6.
[159] Moosajee (2012).
[160] Discussed in para 6 3 1 above.
[161] *Binneman* [3] citing *Munien* para 22.
[162] 2012 (1) SA 226 (SCA) para19.
[163] *Binneman* [4] citing *Majola v Nitro Securitisation* (567/10) [2011] ZASCA 180 [19].
[164] *Binneman* case para 6.
[165] *Absa Bank Ltd v Mkhize and Another,* (716/12) [2013] ZASCA 139, hereafter the *Mkhize* case.

The *Binneman* judgment was not followed by the KwaZulu-Natal High Court in a judgment delivered on 6 July 2012 in the matter of *Mkhize.* In the *Mkhize* case the track and trace reports revealed that even though the notices had returned unclaimed, that it had in fact reached the correct post office.

ABSA Bank, in argument, seeked to reconcile the judgments of *Sebola* and *Rossouw.*[166] The court rejected this argument, as well as the suggestion by the Western Cape High Court[167] that the *Sebola* judgment did not overrule the reasoning adopted in the *Rossouw* decision. The KwaZulu-Natal High Court did not agree that the risk of non-receipt rested squarely with the defaulting consumer. The problem that the court had with ABSA's arguments was that they offered support for the proposition that *Rossouw* was correctly decided, and did not support the fact that *Sebola* endorsed *Rossouw.*[168]

The court placed emphasis on the fact that there was clearly an indication that the notice did not reach the consumer and accordingly section 129(1)(a) of the NCA had not been complied with. In the circumstances, the applications for default judgment were postponed and the court gave directions about delivery of the notice to the defaulting consumer, before the matter could proceed before court again.[169]

The court suggested that to increase the possibility attached to receipt, the notice should be sent to the consumer's place of work in instances where the consumer is employed, the address of a family member, or any other address if the bank is aware of such other address.[170] The court, on its own admission, stated that this imposes an additional administrative burden on the credit provider, but that it is not unreasonable given the importance of complying with section 129.[171] The court, moreover, suggested that in all future actions it would be useful to send the notice by registered post and by ordinary mail. Furthermore, the summons should be endorsed by drawing to the defaulting consumer's attention that litigation is only permissible if the section 129 notice had come to the attention of the consumer and that the

[166] *Mkhize* case para 49.
[167] The case discussed in para 6 3 4 above.
[168] *Idem* para 50.
[169] Moosajee (2012).
[170] *Mkhize* case para 67.
[171] *Ibid.*

consumer has the right to defend the action if the notice was not received, even if the defaulting consumer otherwise admits liability for the claim.[172]

The uncertainty created by *Sebola* caused the Constitutional Court to revisit the section 129(1)(a) matter once again.

6 3 6 *Kubyana v Standard Bank*[173]

In the *Kubyana* case which was handed down by the Constitutional Court on 20 February 2014, the court made the following very important remarks which, it is submitted, would clarify the matter surrounding the delivery and receipt of the section 129(1)(a) notice. If a section 129 notice was sent via registered mail to the correct branch of the post office and the post office subsequently issued a notice of collection to the consumer and such notification of collection was sent to the consumer's correct postal address, then a reasonable consumer would have collected the notice and engaged with its content.[174] The consumer thus bears the burden of rebuttal.[175]

6 4 National Credit Amendment Act

On 16 May 2014 the President signed and assented to the National Credit Amendment Act 19 of 2014.[176] The NCA Amendment Act still has to be put into operation.[177]

Of particular importance is the amendment of section 129 which is stipulated in section 32 (c) of the NCA Amendment Act. This section reads as follow:

> 32 Section 129 of the principal Act is hereby amended –
> (a)…….
> (b)…….
> (c) by the addition of the following subsections:

[172] *Ibid*.
[173] 2014 (3) SA 56 (CC), hereafter the *Kubyana* case.
[174] Paras 35 to 37.
[175] Paras 80 and 98 to 99.
[176] GN 389 in *GG* 37665 of 19 May 2014, hereafter the NCA Amendment Act.
[177] S 39 NCA Amendment Act.

(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).

This is an important amendment which at least makes it clear that a section 129(1)(a) notice "must" be delivered to the consumer. Of further importance is that the legislature now provides clarity on what will constitute compliance with the Act, in particular where delivery of the notice has taken place by means of registered mail. The legislature also now makes it clear that proof of delivery will be satisfied by written confirmation received from the postal service (or its authorised agent) or through the signature or identifying mark of the credit receiver in the scenario where the notice was hand delivered.

There is also now clarity on how the notice must be delivered, namely by registered mail or by hand to an adult person designated by the consumer at the location elected by the consumer.

6 5 Conclusion

It was seen in the preceding discussion on the question of whether the section 129(1)(a) notice must reach the consumer in order to be effective that the initial failure by the legislature to define the word "deliver" in section 130(1) gave rise to conflicting judgments. It was also seen that the Constitutional Court's decision in *Sebola*, which was supposed to provide clarity on the matter, did far from that. This was evidenced by the diverging High Court decisions pursuant to the *Sebola* case. As a result the Constitutional Court in *Kubyana* had to revisit the above-mentioned question again. The court decided that if the credit provider dispatched the section

129(1)(a) notice by registered mail and the notice reached the correct branch of the post office and the post office notified the consumer at his address that a registered item awaited collection then the onus of rebuttal is shifted onto the consumer. The *Kubyana* decision is to be welcomed. Although it was never said in the *Sebola* decision that the section 129(1)(a) notice has to reach the consumer in order to be effective, a loophole was created by the court for consumers to avoid the receipt of the notice. This gap has now been closed in terms of the *Kubyana* case. Where the credit provider has proven compliance with the above-mentioned three aspects, the consumer must show why it could not have reasonably been expected that the notice must have reached the consumer.

The proposed amendment in terms of section 32(c) of the NCA Amendment Act is also to be welcomed. At least it is now specifically required that the section 129(1)(a) notice is obligatory for debt enforcement of a credit agreement falling under the National Credit Act. In particular, the fact that “delivery” is now defined in terms of the NCA Amendment Act as well as the fact that it is spelled out by the legislature what will constitute compliance with the provisions of the Act in this regard is to be commended.

7 Final Conclusions and Recommendations

The purpose of this dissertation was to consider aspects of the section 129(1)(a) notice as a prerequisite for debt enforcement in terms of the National Credit Act. The particular aspects that received attention were (a) what the meaning of the term debt enforcement is and whether a wide meaning should be attached to the concept to include the cancellation of credit agreements and claims for damages as well; (b) whether compliance with section 129(1)(a) is a prerequisite for the enforcement of a debt under the NCA; (c) the content of the section 129(1)(a) notice and the time limits involved in respect of debt enforcement; and (d) whether the section 129(1)(a) notice must indeed reach the consumer in order to be effective. These aspects were addressed with reference to the provisions of the National Credit Act, case law and the opinions of authors. Where applicable, regard was also had to the provisions of the NCA Amendment Act.

As far as the meaning of the term “debt enforcement” is concerned, it was seen that in terms of case law and the opinions of authors a wide meaning should be attached to the concept.[178] This means that “debt enforcement” for purposes of the National Credit Act does not only mean claims for specific performance as a means to enforce his debt by the credit provider but the enforcement of any of the credit provider’s remedies, including cancellation of the credit agreement and a claim for damages, if any were suffered.[179] This interpretation is endorsed as any other interpretation would have meant that a section 129(1)(a) notice is only required in the case of a claim for specific performance. This in turn would have meant that in the event of the more drastic remedies such as a claim for cancellation, a section 129(1)(a) notice would not have been required. This would have deprived the consumer of important protection which would have been to the consumer’s detriment.

After regard was had to the purpose of the section 129(1)(a) notice,[180] it was ascertained that compliance with the notice is a prerequisite for debt enforcement in

[178] Para 3 2.
[179] Para 3 2.
[180] Para 4 2.

terms of the National Credit Act.[181] This is in spite of the use of the word "may" in section 129(1)(a). Although it is clear from the wording of section 129(1)(b) that compliance with the notice requirement under sub-section 1(a) is required for debt enforcement, it was still necessary for the courts to reiterate that the section 129(1)(a) notice is required under all circumstances in terms of the Act.[182] It is therefore to be welcomed that the legislature now makes it clear by means of the insertion of section 129(5) by section 32(c) of the NCA Amendment Act that delivery of the section 129(1)(a) notice must take place.[183] Finally, the implications of non-compliance with section 129 were considered.[184]

There is not much to say regarding the content of the section 129(1)(a) notice and the time periods involved in this regard, aspects that were discussed in paragraph 5. The only remark I want to reiterate is that it is possible for a credit provider or his legal representative to ensure that the two periods involved in terms of section 130(1) run concurrently, which is to the credit provider's benefit.[185] The credit provider is enabled to issue summons sooner to enforce his remedies in terms of the credit agreement or the common law.

Concerning the question whether the section 129(1)(a) notice has to reach the consumer in order to be effective, it was shown by having regard to the NCA's predecessors and the legislation pertaining to instalment agreements in respect of sale of land contracts[186] that the issue is not new. It was also seen that the answer to the question lies in the interpretation of the wording of the particular provision in the particular enactment.[187] The same holds true for the provision in terms of the NCA, section 129(1)(a) read with sections 129(1)(b) and section 130(1).[188]

The problem under the NCA was also caused by the failure of the legislature to define the word "delivered" used in section 130(1).[189] It was therefore necessary for our courts to clarify the matter. In this regard the *Kubyana* case[190] is to be

[181] Para 4 3.
[182] Para 4 3.
[183] Para 6 4.
[184] Para 4 4.
[185] See para 5 2.
[186] Para 2.
[187] Para 2 5.
[188] Para 4 3 2.
[189] Para 6 1.
[190] Discussed in para 6 3 6.

commended. The Constitutional Court revisited a decision made by the same court in the *Sebola* case[191] which gave rise to conflicting High Court decisions[192] and eventually gave clarity by deciding that if a credit provider proves that the section 129(1)(a) notice was dispatched by registered mail and the notice reached the correct branch of the post office and the post office notified the consumer at his address that a registered item awaited collection, the onus would then rest on the consumer to show why it couldn't be reasonably expected that the section 129(1)(a) notice indeed reached the consumer.[193] This effectively stamped out the opportunity consumers had as a result of the *Sebola* case to avoid or delay debt enforcement against them by, for instance, not collecting the section 129(1)(a) notice from the post office.

The amendment of section 129 by section 32(c) of the NCA Amendment Act by the insertion of sub-sections (5) to (7) is also to be welcomed.[194] As a result the methods of delivery will be clear in future as well as what will have to be done by credit providers or their legal representatives to comply with the Act as amended. It is just hoped that we will not have a *Sebola* situation again because if regard is had to the proposed amendments delivery via registered mail and proof that the registered mail has reached the correct post office are required, the same requirements as per *Sebola*. However, the legislature makes it clear in sub-section (7) that "[p]roof of delivery" is satisfied by written confirmation received from the postal service (or its authorised agent) or through the signature or identifying mark of the credit receiver in the case where the notice was hand delivered.

In the light of the court decisions decided on the various aspects addressed in this dissertation and particularly in light of the proposed amendments to section 129 of the Act, no particular recommendations are deemed to be necessary.

[191] See para 6 3 3.
[192] Paras 6 3 4 & 6 3 5.
[193] Para 6 3 3.
[194] Para 6 4.

Bibliography:

Books:	**Mode of citation:**
Diemont MA & Aronstam PJ *The Law of Credit Agreements and Hire-Purchase in South Africa* (5th edition) Juta Wetton Cape Town 1982	Diemont & Aronstam (1982)
Flemming HCJ *Krediettransaksies* Butterworths Durban 1982	Flemming (1982)
Grové NJ & Otto JM *Basic Principles of Consumer Credit Law* (second edition) Juta Lansdowne Cape Town 2002	Grové & Otto (2002)
Kelly-Louw M & Stoop PN *Consumer Credit Regulation In South Africa* Juta Cape Town 2012	Kelly-Louw & Stoop (2012)
Otto JM *"Commentary" Credit Law Service* 1991 *et Seq,* with updates (Last updated: 26 August 2006) Lexis Nexis Durban 1991	Otto (1991)
Otto JM & Otto RL *The National Credit Act Explained* (3rd edition) Lexis Nexis Durban 2013	Otto & Otto (2013)
Van Heerden CM in Scholtz JW (ed) *Guide to the National Credit Act Lexis* Nexis Durban 2009	Van Heerden in Scholtz (ed) (2009)

Journals:	**Mode of Citation**
Borraine A & Renke S "Some Practical and Comparative Aspects of the Cancellation of Instalments Agreements in terms of the National Credit Act 34 of 2005 (Part 2)" 2008 *De Jure* 1	Borraine & Renke (2008) *De Jure*
Otto "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; First* Rand *Bank Ltd v Dlamini*" 2010 *SA Mercantile Law Journal* 595-607	Otto (2010) SA Merc LJ

Van Heerden C & Borraine A "The Conundrum of the Non-Compulsory Notice in terms of Section 129(1)(a) Of the National Credit Act" 2011 *SA Mercantile Law Journal* 45-63	Van Heerden & Borraine (2011) SA SA Merc LJ
Van Heerden C & Coetzee H "Artikel 129(1)(a) van die Nasionale Kredietwet 34 van 2005: Verwarrende verwarring oor voldoening" 2012 Litnet	Van Heerden & Coetzee (2012) Litnet
Van Heerden CM & Coetzee H "*Marimuthu Munien v BMW Financial Services SA (Pty) Ltd* Unreported Case Number 16103/08 (KZD) 2009 *Potchefstroom Electronic Journal* 333-360	Van Heerden *&* Coetzee (2009) PER
Van Heerden CM & Otto JM "Debt Enforcement in terms Of the National Credit Act 34 of 2005" 2007 *TSAR* 666	Van Heerden & Otto (2007) TSAR

Statutes, Regulations and Other

Statutes:

Alienation of Land Act 68 of 1981

Credit Agreements Act 75 of 1980

Financial Services Ombud Schemes Act, 2004 (Act 37 of 2004)

Hire-Purchase Act 36 of 1942

Hire-Purchase Amendment Act 30 of 1965

Interpretation Act 33 of 1957

National Credit Act 34 of 2005

National Credit Amendment Act 19 of 2014

Sale of Land on Instalments Act 72 of 1971

Regulations:

Regulations made in terms of the National Credit Act, 2005 (GN R489, *Government Gazette* 28864, 31 May 2006)

Other:

Cape Provincial Division practice note 25

Natal Provincial Division rule of practice 28

Proc 22 in GG 28824 of 11 May 2006

Table of cases

ABSA Bank Limited v Kritzinger Case no 6474/2009

Absa Bank Ltd v Mkhize and Another (716/12) [2013] ZASCA 139

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

ABSA Ltd v De Villiers 2009 5 SA 40 (C)

Dwenga v First Rand Bank Limited (2011) ZAECELLC 13

First Rand Bank Limited v Dhlamini (50146/09) [2010] ZAGPPHC 25; 2010 (4) SA 531 (GNP) (17 March 2010)

First Rand Bank Ltd v Olivier 2009 (3) SA 353 (SEC)

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

Firstrand Bank v Bernardo Case no 608/09

Fitzgerald v Western Agencies 1968 (1) SA 288 (T)

Gundwana v Steko Development 2011 3 SA 602 (CC)

Kubyana v Standard Bank 2014 (3) SA 56 (CC)

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

Majola v Nitro Securitisation (567/10) [2011] ZASCA 180

Maron v Mulbarton Gardens (Pty) Ltd 1975 1 All SA 32 (W).

Marques v Unibank Ltd (2000) 4 All SA 146 (W)

Munien v BMW Financial Services (SA) (Pty) Ltd & Another [2009] JOL 23387 (KZD)

Nedbank Ltd v Binneman 2012 (5) SA 569 (WCC) (21 June 2012)

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

Rossouw v First Rand Bank 2010 (6) SA 439 (SCA)

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

Standard Bank of SA Ltd v Van Vuuren 2009 (5) SA 557 (T) 562

Standard Bank of South Africa Ltd v Mellet and Another [2009] ZAFSHC 110

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

Starita v Absa Bank Limited and Another (745/2009) [2010] ZAGPJHC 13

Van Niekerk & Another v Favel & Another 2006 (4) SA 548 (W)

Weinbren v Michaelides 1957 (1) SA 650 WLD

Internet:	**Mode of Citation**
Moosajee (2012) "Notice under the National Credit Act to defaulting consumers: Conflicting High Court judgments post Constitutional Court Sebola judgment" available online at: http://www.polity.org.za/article [accessed: 21 March 2013]	Moosajee (2012)

Theses and Dissertations:	**Mode of Citation**
Chabalala EC Debt Enforcement in terms of The National Credit Act 34 of 2005: A Critical Evaluation	Chabalala LLM Dissertation (2013)
Coetzee H *The impact of the National Credit Act on civil procedural aspects relating to debt enforcement* submitted in accordance for the requirement of the degree Magister Legum, University of Pretoria (2009)	Coetzee LLM Dissertation (2009)
Renke S *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005*: Thesis submitted in fulfilment of the requirements for degree Doctor Legum, University of Pretoria (2012)	Renke LLD Thesis (2012)
Stander M *Formal procedural requirements for debt enforcement in terms of the National Credit Act*	Stander LLM Dissertation (2012)

submitted in accordance for the requirement of the
degree Magister Legum, University of Pretoria (2012)