The importance of section 127 of the National Credit Act 34 of 2005

Corlia van Heerden
B Proc LLB LLM LLD
Barclays Africa Chair in Banking Law in Africa
Professor, Department of Mercantile Law, University of Pretoria

OPSOMMING

Die belangrikheid van artikel 127 van die *National Credit Act* 34 van 2005

Artikel 127 van die *National Credit Act* 34 van 2005 maak voorsiening vir vrywillige teruggawe van goedere wat behels dat 'n verbruiker eensydiglik kan besluit om eiendom wat die onderwerp vorm van 'n afbetalingsooreenkoms, 'n huurooreenkoms of 'n versekerde lening waarop die Wet van toepassing is, aan die kredietverskaffer terug te gee met die versoek dat die ooreenkoms beëindig word. 'n Omvattende proses wat ten doel het om die verbruiker te beskerm teen bepaalde misbruike word deur die Wet voorgeskryf by sodanige vrywillige teruggawe. Die proses word ook deur die Wet van toepassing gemaak op beslagleggingsbevele wat verky word ingevolge artikel 131 van die Wet. Hierdie bydrae voer aan dat artikel 127 'n uiters belangrike bepaling is gegewe die beskerming wat dit aan die verbruiker bied. Ter ondersteuning van hierdie uitgangspunt ondersoek die bydrae die toepassingsgebied van artikel 127 asook die mate van voldoening wat van die kredietverskaffer geverg word en die sankies wat volg op nie-voldoening. Daar word ook spesifiek ondersoek ingestel na die wyse waarop die kennisgewings in artikel 127(2) en (5) aan die verbruiker gegee moet word ten einde behoorlike voldoening daar te stel.

1 INTRODUCTION

The National Credit Act 34 of 2005 (NCA) has significantly changed the landscape of credit regulation that prevailed in South Africa prior to 1 June 2007. It also significantly curtailed the common-law rights of credit providers in various respects, *inter alia* through the introduction of the right of voluntary surrender as contained in section 127 which provides credit consumers with a right of statutory repudiation.[1]

1 Vessio "Section 127 of the National Credit Act: A form of statutory repudiation – How it modifies the common law" 2016 *Speculum Juris* 67. Vessio remarks that this is not a common law right that is ordinarily available to a credit consumer – unilateral termination of a contract by one party in the absence of breach by the other is a form of anticipatory breach, namely repudiation, and is usually followed by a claim for damages by the other party. She submits that s 127 entitles the consumer to repudiate certain credit agreements without the presence of the element of wrongfulness normally associated with anticipatory breach. Vessio points out that this is a dramatic alteration of common law principles which state that the obligations imposed by the terms of an agreement must be honoured, failing which the person who has the duty to perform is said to have committed breach of contract. Furthermore, if the consumer exercises his right of repudiation in terms of s 127, the credit provider is not entitled to be put in the position it would have been in had the contract been performed. She points out that this is in contrast to the common-law rule for damages, which states that the innocent party (in this scenario the credit provider) must be placed in as good a

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Apart from the substantive right to surrender goods that it affords consumers, section 127 also imposes procedural imperatives, non-compliance with which may significantly affect a credit provider's right to obtain payment of the outstanding balance of a credit agreement that has been subjected to this process. This contribution considers the purpose, scope and application of section 127, the procedural compliance it mandates and the impact of non-compliance with the section on the rights of the parties to the credit agreement. However, the inter-relation between section 127 and the process of reinstatement as contemplated in section 129(3) and (4) is not addressed in this contribution and is dealt with by the author in a separate contribution.

2 THE SECTION 127 PROCEDURE

Section 127 provides that a consumer under an instalment agreement, secured loan or lease may "give written notice to the credit provider to terminate the agreement".[2] If the goods that are the subject of the credit agreement are in the credit provider's possession, the consumer may in the section 127(1) notice require the credit provider to sell the goods, or otherwise the consumer may return the goods to the credit provider's place of business.[3] Within 10 business days after the later date of receiving a notice in terms of section 127(1)(b)(i) requiring the credit provider to sell the goods or receiving goods tendered in terms of section 127(1)(b)(ii), the credit provider is obliged to give the consumer written notice setting out the estimated value of the goods and any other prescribed information.[4]

Section 127(3) provides that a consumer who is *not* in default may within 10 business days after receiving a section 127(2) valuation notice from the credit provider, unconditionally withdraw the notice to terminate the agreement that was given in terms of section 127(1)(a), and resume possession of any goods that are in the credit provider's possession. Section 127(4)(a) provides that if the consumer responds "to a notice as contemplated in subsection (3)" the credit provider must return the goods to the consumer unless the consumer is in default

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position financially had the breach not occurred. See also Otto in Scholtz *et al Guide to the National Credit Act* (2008 *et seq*) para 9.5.4.1; Coetzee "Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 569; Kelly-Louw *Consumer credit regulation in South Africa* (2012) 282–287 and Otto "The surrender of goods in terms of the National Credit Act 34 of 2005" 2015 *THRHR* 487 490.

2 S 127(1). Otto 2015 *THRHR* 487 remarks that the word "terminate" in s 127(1) must be understood as referring to provisional termination.

3 S 127(1)(a) and (b)(i) and (ii). If the goods are so returned by the consumer, s127(2) provides that it must be done during ordinary business hours within five business days after the date of the notice of termination in terms of s 127 or within such other period or at such other time or place as may be agreed with the credit provider. However, it should be noted that s 127(1) indicates that where the goods are not yet in the credit provider's possession the consumer, pursuant to a s 127(1) notice, *may* return the goods to the credit provider. It thus appears that a consumer who gives a notice in terms of s 127(1) is not obliged to follow it through by delivering the goods. In such instance, the credit provider will then have to repossess the goods via court order from a defaulting consumer.

4 S 127(2). The word "must" is used. For purposes of this discussion the s 127(2) notice will also be referred to as a "valuation notice". Currently, no other information to be contained in the s 127(2) notice is prescribed.

under the credit agreement.[5] However section 127(4)(b) states that if the consumer does not respond to "a notice as contemplated in subsection (3)", the credit provider must sell the goods "as soon as practicable for the best price reasonably obtainable".[6] After selling any goods in terms of section 127, a credit provider is obliged to credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the credit provider in connection with the sale of the goods.[7] In addition the credit provider must give the consumer a written notice stating the following:[8] (a) the settlement value of the agreement immediately before the sale; (b) the gross amount realised on the sale; (c) the net proceeds of the sale after deducting the credit provider's permitted default charges, if applicable, and reasonable costs allowed; and (d) the amount credited or debited to the consumer's account.

Section 127(6) provides that if an amount is credited to the consumer's account and it exceeds the settlement value immediately before the sale, and another credit provider has a registered credit agreement with the same consumer in respect of the same goods (that is, a situation of "double discounting"), the credit provider must remit that amount to the National Consumer Tribunal.[9] The Tribunal may then make an order for the distribution of the amount in a manner that is just and reasonable. Alternatively, if no other credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit the aforesaid excess amount to the consumer with the notice required by section 127(5)(b), and the agreement is then *terminated* upon remittance of that amount.[10]

If an amount is credited to the consumer's account and it is less than the settlement value of the goods immediately before the sale, or an amount is debited to the consumer's account, the credit provider may demand payment from the consumer of the remaining settlement value, when issuing the notice required by section 127(5)(b).[11] If the consumer fails to pay the amount demanded in terms of section 127(7) within 10 business days after receiving a demand notice, section 127(8) provides that the credit provider may commence proceedings in terms of the Magistrates' Courts Act[12] for judgment enforcing the credit agreement. However, where the consumer pays the amount demanded after receiving a demand notice at any time before judgment is obtained against such consumer, the agreement is *terminated* upon remittance of that amount.[13]

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5 S 127(4)(a).

6 See Otto 2015 *THRHR* 493 who traces the origin of this phrase back to s 78 of the Australian Consumer Credit Code 1996.

7 As pointed out by Otto 2015 *THRHR* 487 it will not often happen that a consumer's account is debited after a sale of goods.

8 S 127(5)(a) and (b)(i)–(iv).

9 The National Consumer Tribunal is established in terms of s 26 of the NCA. See s 27 regarding its functions and ss 149–152 regarding the orders it can make.

10 Author's emphasis.

11 S 127(7).

12 Act 32 of 1944. Author's emphasis.

13 S 127(9) provides that in either event contemplated in s 127(8), interest is payable by the consumer at the rate applicable to the credit agreement on any outstanding amount demanded by the credit provider in terms of s 127(7) from the date of the demand until the date that the outstanding amount is paid. See further Coetzee 2010 *THRHR* 569.

It is important to note that section 127(10) states that a credit provider who acts in a manner contrary to section 127 is guilty of an *offence*.[14] It should also be noted that regulation 31(2)(y) requires a credit provider to insert a clause in the relevant credit agreements notifying the consumer of his right to surrender goods in terms of section 127 and the process to be followed in such instance.[15]

3 OTHER SECTIONS TO BE READ WITH SECTION 127

Section 127 must be read with some other sections in the NCA, which, it is submitted, may also shed some light on its importance and interpretation, namely, sections 128, 129(4)(a)(ii), 130 and 131.

3 1 Section 128: Compensation for consumer

Section 128 provides that a consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of section 127 directly with the credit provider, or through alternative dispute resolution under Part A of Chapter 7, may apply to the Tribunal to review the sale.[16] If the Tribunal is not satisfied that the credit provider sold the goods as soon as reasonably practicable, or for the best price reasonably obtainable, the Tribunal may order the credit provider to credit and pay to the consumer an additional amount exceeding the net proceeds of the sale.[17]

3 2 Section 129(4): Reinstatement

Section 129(4)(a)(ii) deals with the contentious subject of reinstatement of a credit agreement and provides that a *credit provider* may not *reinstate or revive* a credit agreement after the sale of any property pursuant to surrender of property in terms of section 127. Save to note the reference in section 129(4) to section 127, the issue of the interrelation between section 127 and 129(4)(b)(ii) is not pursued further in this article as the complexity and length of an investigation into this aspect merit a separate article.

3 3 Section 130: Debt procedures in court

Section 130 deals with debt enforcement proceedings commenced in a court in respect of a credit agreement to which the NCA applies. Note should be taken of section 130(3)(a) which provides as follows:

> "Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies,

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14 Author's emphasis.

15 Reg 31(2)(y) of the Regulations to the National Credit Act published in GN R489 in *GG* 28864 of 31 May 2006 as amended by GN R1029 of 30 November 2006.

16 S 128(1). See further s 134(4) that generally requires the consumer to attempt to resolve a dispute by first approaching the credit provider and which provides that if the parties are unable to resolve the dispute, the matter must then be referred to alternative dispute resolution. The Tribunal may be approached only once the alternative dispute resolution is unsuccessful (s 134(5)). In *Alphera Financial Services, a Division of BMW Financial Services (SA) (Pty) Lt v Rosscam Thirteen CC t/a Supreme Trailers* [2015] JOL 34703 (GNP) para 8 the court stated: "What is important about section 128 is the fact that in a credit agreement which falls under the National Credit Act, the consumer has a leeway to take legal steps to ensure that his/her/its goods are not sold for the proverbial song, where the credit provider is at will to decide the price at which they are sold."

17 S 128(2). S 128(3) provides that a decision by the Tribunal in terms of s 128 is subject to appeal to, or review by, the High Court to the extent permitted by s 148.

> *the court may determine the matter only if the court is satisfied that*[18]–
> (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with."

Note should also be taken of section 130(4)(b) which provides the sanction for non-compliance with section 130(3)(a) (which *inter alia* refers to section 127) and states that:

> "In any proceedings contemplated in this section, if the court determines that
> (b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplated in subsection (3)(c), the court *must*[19]
> (i) adjourn the matter before it; and
> (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed."[20]

3 4 Section 131: Repossession of goods

Section 131 of the NCA deals with repossession of goods and provides as follows:

> "If a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127(2) to (9) and section 128, *read with the changes required by the context*, apply with respect to any goods attached in terms of that order."[21]

4 DISCUSSION

4 1 Limited scope of application of section 127 and other general observations

Section 127 has limited application in so far as this procedure of "voluntary surrender of goods"[22] is confined to instalment agreements, secured loans or leases; hence a consumer who voluntarily enters this process can only do so where movable goods are financed or otherwise put up as security.[23] The section 127 process can be utilised by a consumer who may, or may not, be in default – although it is submitted that it is quite unlikely that a consumer who is not in default will elect to use this process.[24] Nevertheless, as is discussed below, the fact that a consumer *is* in default means that his use of the section 127 process may have consequences that in some important respects differ from the consequences where the process is used by a *non*-defaulting consumer. It is further to be noted that section 127 can be utilised in the event either where the credit provider is already in possession of the goods (for example, where the credit provider has repossessed goods from a third party or from the consumer without having

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18 Author's emphasis.
19 Author's emphasis.
20 For a detailed discussion of s 130(4)(b), see Van Heerden in Scholtz *et al Guide to the National Credit Act* (2008 *et seq*) (hereafter Van Heerden) para 12.9.3.
21 Author's emphasis.
22 In the context of the NCA, "goods" refers to movables and the broader concept "property" is used to refer to both movables and immovables.
23 See Coetzee 2010 *THRHR* 576 who notes that the incorporation of s 127(2)–(9) into s 131 also extends its application to immovable goods that were repossessed through court intervention.
24 This sentiment is shared by Otto 2015 *THRHR* 492.

resorted to court for an attachment order)[25] or where the consumer is still in possession of the goods.

It is clear that section 127 in the first place applies primarily to a situation where repossession or return of the goods occurred voluntarily without any court order mandating such repossession or return – otherwise the provisions of section 127 would not have been enacted in this specific separate section but it would have appeared only in and as part of section 131 (as indicated above) that deals with attachment orders and the process that applies upon attaching property[26] in terms of an attachment order. However, it is submitted that the situation where the use of the surrender process by a defaulting consumer is forced and not implemented at his own initiative and, thus, constitutes a contravention of the section by the credit provider, must be distinguished from the situation where the credit provider merely advises the consumer (who may often not even know about the existence of section 127), in the consumer's own best interest, to use section 127(1) and then facilitates this process – in which case it is submitted there is no contravention of the voluntary nature of the section.[27]

For the provisions of section 127 to operate where a consumer wants to effect a voluntary surrender of goods in order for the relevant credit agreement eventually to be terminated, the section requires the consumer to give the credit provider written notice "to terminate the agreement". The section 127(1) notice constitutes at most a "statutorily sanctioned repudiation" of the agreement by the consumer but the notice itself does not terminate the agreement. It only sets in motion the process that leads to the eventual termination of the agreement, which termination occurs at a later stage as set out in section 127(6)(b) or 127(8)(b).[28]

The purpose of section 127 appears to be to regulate this extra-judicial procedure in the instance where a consumer voluntarily decides to terminate a credit agreement via the statutory mechanism of voluntary surrender, absent the cost and delay otherwise occasioned by a court process and to bring legal certainty as to the steps that have to be taken by the parties. Clearly, the objective of laying down the procedure that has to be applied in such an event is to ensure that "due process" is followed so that the consumer is not prejudiced, for instance by delays in selling the goods (as its value might be fast depreciating such as is generally the case with movables) and/or[29] the goods not being sold at the best price

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25 See s 127(1)(b) which refers to goods that are in the credit provider's possession by the time that the s 127(1) notice is given. It is to be noted that there is no requirement in s 127 that such repossession should have occurred by way of court order. It could thus mean that the consumer may already have returned the goods to the credit provider voluntarily but could also include situations where a third party voluntarily returns the goods to the credit provider or returns it pursuant to the credit provider settling a lien that the third party has in respect of the goods.

26 Note that whereas s 127 uses the word "goods" which ordinarily means movables, s 131 uses the word "property" which includes movables and immovables.

27 Note specifically the observations in para 4 2 2 regarding non-compliance with s 127(2)–(9) after repossession of property in terms of an attachment order.

28 See Coetzee 2010 *THRHR* 569.

29 Although s 128 entitles the consumer to approach the Tribunal where goods have not been sold as soon as possible *or* for the best price reasonably obtainable it is quite conceivable that in a given matter goods may not have been sold as soon as practicable *and* therefore also not for the best price reasonably obtainable due to the depreciation caused by the delay in selling the goods.

reasonably obtainable.[30] The aim of the section thus appears to be to facilitate the speedy sale of the goods in order to mitigate the consumer's loss due to depreciation of the goods. It further ensures that the consumer is informed of relevant aspects such as the settlement value of the agreement before the sale of the goods, the sale price and amount deducted from such price and what amount he will be debited or credited with *and* to check that he is actually debited or credited with the amount stated in section 127(5).[31] It also facilitates the process after the sale of the goods, notably payment by the consumer of any outstanding balance or, through application of section 128, the process for disputing the sale.

As regards the process to be followed pursuant to a notice in terms of section 127(1): the credit provider has a very limited time period to attend to the valuation of the goods, given that he is required within the span of 10 business days after receiving a section 127(1) notice (where the goods are already in the credit provider's possession at the time that the notice is given by the consumer) or within 10 business days after having received goods pursuant to such a surrender notice, to attend to the valuation of the goods *and* also give the consumer notice of same.[32] Clearly this short time period allowed for valuation of the goods serves to ensure that the credit provider does not delay the valuation process to the prejudice of the consumer and to ensure that the goods can be sold quickly after valuation.

Section 127 provides a consumer who is *not* in default with the choice, upon receiving the written notice regarding the valuation of the goods, to unconditionally withdraw the notice to terminate the agreement in terms of section 127(1)(a). Such withdrawal is provided for in section 127(3) and has to occur within 10 business days after receipt of the section 127(2) valuation notice. If he elects to withdraw, the non-defaulting consumer can then regain possession of the relevant goods and it appears that the agreement will then *ex lege* carry on as before.[33] Thus the receipt of the valuation notice by a consumer who is *not* in default will enable him to make an informed decision as to whether to withdraw from the surrender process or whether to proceed with the process and have the goods sold by the credit provider. Although not specifically stated in section 127(3), it is submitted that where a credit provider gives a non-defaulting consumer

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30 See Coetzee 2010 *THRHR* 574 and Otto 2015 *THRHR* 487.

31 It does strike one as a bit odd that s 127(1)(b)(i) indicates that where the goods are already in the credit provider's possession the consumer may request that the credit provider sell the goods but that where the goods are still in the consumer's possession there is no added requirement in s 127(1)(b)(ii) indicating that when the consumer returns the goods he must request the credit provider to sell those goods. Probably the difference has something to do with the fact that the consumer in s 127(1)(b)(i) is most likely in default under the agreement whilst the consumer in s 127(1)(b)(ii) is not necessarily in default. Then again, it is possible that it could have been a mere oversight by the legislature. Nevertheless, it can be agreed that s 127 envisages that where a consumer elects to use the process (and, should he *not* be in default, at no stage withdraws from the process as per section 127(3)) the next step after the written notice of surrender has been given, will be for the credit provider first to do a valuation of the goods, inform the consumer of the valuation and thereafter to sell the goods and account for the sale price.

32 S 127(2)(a) and (b). In *Audi Financial Services v Safter* [2017] ZAWCHC 68 (28 June 2017) para 58 the court held that a written notice regarding the valuation of the goods is contemplated by s 127(2) hence an sms notification of the value would not suffice for purposes of compliance with s 127(2).

33 S 127(4)(a).

notice of the valuation of goods that have been surrendered, such notice should also mention that the non-defaulting consumer has the choice of withdrawal as contemplated in section 127(3).[34] The important aspect to also note here is that generally goods cannot be sold before at least 10 business days have lapsed since a non-defaulting consumer has received the section 127(2)-valuation notice[35] – unless he makes it clear to the credit provider before expiry of such ten days that he wishes to continue with the section 127 process. Of course, where the non-defaulting consumer decides to withdraw, the goods must be returned to him and no sale may take place.

However, this specific "right of withdrawal" envisaged by section 127(3) is not available to a consumer who *is* in default – this much is clear from the words "unless the consumer is in default" as stated in section 127(3). It is to be noted though that section 127 does not make it clear whether default at the time of giving a section 127 notice or otherwise at the time that the consumer receives the valuation notice is the yardstick. It is submitted that the most likely interpretation is that the default that bars a consumer from withdrawing from the surrender process appears to be default at the stage that the consumer receives the valuation notice. It is submitted that it therefore is possible that a consumer who was in default at the time that he gave the credit provider a section 127 notice may, prior to the receiving the notice of valuation of the goods, pay up his arrears to the extent that he is no longer in default – in which event he may utilise the right to withdraw as contemplated in section 127(3).[36]

So, from the perspective of a consumer who is *not* in default the valuation notice is pivotal, as it informs his choice whether or not to withdraw from the section 127 process, and even where he does decide to carry on with the section 127 process, receipt of the valuation-notice enables him eventually to determine whether or not he should dispute the sale price. However, although a consumer who *is* in default cannot withdraw (as contemplated in section 127(3)) from the section 127 process upon receipt of a valuation notice, such notice is also considerably important to the defaulting consumer due to it also being instructive in eventually determining whether the goods were sold as soon as practicable for the best price reasonably obtainable and whether the consumer would have grounds to dispute the sale of the goods.[37]

Section 127(4), however, appears to pose an interpretational conundrum. It refers to "the consumer" who either *responds* "to a notice as contemplated in subsection (3)" or who *does not respond* to "a notice as contemplated in subsection (3)". As indicated, section 127(3) refers to a valuation notice as per section 127(2) and does not expressly require the giving of yet another separate notice regarding a non-defaulting consumer's right of withdrawal. It is submitted that a credit provider would generally in the section 127(2) valuation notice itself indicate to the consumer that he has a right of withdrawal should he *not* be in default.

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34 It cannot be assumed that the non-defaulting consumer will know that he has this right of withdrawal so it would be prudent to advise him of same.

35 S 127(3) specifically refers to receipt of the s 127(2)-notice.

36 Coetzee 2010 *THRHR* 574.

37 However, it is not only the valuation that speaks to the question whether the goods were sold for the best price reasonably obtainable, but also the time period that expired since the goods were valued and before they were sold, as it is trite that generally goods depreciate as time goes by.

So, the words "a notice as contemplated in section (3)" should probably rather have read "a notice in terms of subsection (2), in the manner contemplated in subsection (3)".

From a proper reading of section 127(3) together with section 127(4)(a) and (b), it appears that only a consumer who is *not* in default can actually "respond" to a section 127(2) notice by indicating that he wishes to make use of the statutory opportunity to withdraw the surrender of the goods as allowed by section 127(3).[38] Obviously such a consumer who is *not* in default can also decide, after receipt of the valuation notice, that he wishes the section 127 process to continue its course in which instance he may either communicate this to the credit provider or merely refrain from responding. However, a consumer who actually *is* in default at the time of receiving the valuation notice is not allowed to respond as contemplated by section 127(3). So it may be asked whether a *defaulting* consumer is allowed *any other* response by section 127 itself upon receipt of a valuation notice. It is submitted that considering that section 127 aims to create a process where goods that are subject to an instalment sale, lease or secured loan can be voluntarily returned and sold quickly to mitigate the consumer's loss it would not make sense to allow for the dispute of the valuation of the goods at this early stage. This is because such dispute may have the potential to evolve into a protracted battle during which the goods will only lose value and the objective of assisting the consumer to relieve himself of his credit agreement debt will probably be compromised by the decreased value of the goods and a larger outstanding balance to be recovered from such consumer. The idea behind section 127 appears to be to place no procedural obstacles in the way of selling the goods as soon as practicable after the valuation thereof. However, the consumer will eventually be able to use such valuation if he wishes to dispute the sale price of the goods with reference to the amount of the valuation or the detrimental effect on the sale price of the time period that elapsed since the valuation. His right to dispute the amount that the goods fetched at the sale is thus preserved to be exercised at a more opportune stage when the section 127 process, for which time appears to be of the essence, has taken its course. In this regard it should also be noted that section 128, which allows for a consumer to dispute a sale of goods, is a "post-sale remedy" and does not provide a mechanism for a pre-sale dispute of the valuation of the goods, as discussed in more detail below.

It is further submitted that section 127 itself does not provide an opportunity for reinstatement of the credit agreement by a defaulting consumer, as it contains no provisions relating to reinstatement and does not specify any amounts that have to be paid for this purpose. However, it does not preclude reinstatement of the credit agreement in accordance with section 129(3) and (4) and, given that section 129(4) allows for reinstatement up until the sale of the goods, it is submitted that such reinstatement by a consumer who *is* in default appears to be possible at this stage.[39] However, such reinstatement can hardly be said to

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38 S 127(3) does not state exactly how this right of withdrawal from the s 127 process should occur and it is submitted that generally it would be most prudent, for purposes of legal certainty, that the non-defaulting consumer indicates his election to withdraw in writing or that, if communicated orally, the credit provider records such election in writing upon receiving the said communication.

39 As indicated, due to the length and complexity involved in interrogating the interaction between voluntary surrender and reinstatement this issue is addressed in detail in a follow-up contribution by the author.

constitute a response to a valuation notice by *withdrawal as contemplated in section 127(3)* and, furthermore, it must be remembered that the right of withdrawal is expressly limited to the 10 business day period after receipt of a valuation notice whilst reinstatement as per section 129(3) and (4) appears to be possible up to the time that the goods are sold.[40] The point is that "the consumer" in section 127(4)(a) and (b) appears to refer only to a *non*-defaulting consumer because this is the only type of consumer who can respond "as contemplated in section 127(3)".

Where a non-defaulting consumer chooses not to exit the section 127 procedure as contemplated in section 127(3), the remainder of the section 127 procedure is aligned for both defaulting and non-defaulting consumers, as the goods are then required to be sold and such sale has to be followed up with a section 127(5)(b) notice. As regards the section 127(5)(b) notice that has to be provided to the consumer (thus to a consumer who *is* in default *or* a consumer who is *not* in default but who elected to proceed with the section 127 process after receipt of a valuation notice) after the sale of the goods, it appears that the purpose of this notice is not only to notify the consumer of the outstanding balance but also to provide him with information relating to what the proceeds of the sale of the goods were so that he can be in a position to compare the valuation notice he received earlier with the amount that was actually realised at the sale. Being able to do such a comparison thus places the consumer in a position *after* the sale to dispute the sale in accordance with section 128 or later in court proceedings, if grounds for disputing such a sale indeed exist.[41] The section 127(5)(b) notice further puts the consumer in a position to dispute the settlement value of the goods before the sale occurred (if, for instance, there is a calculation error or some payments towards the instalments were not taken into account) as well as to dispute the amount debited or credited to the consumer's account for instance on the basis of a calculation error in that regard.[42] It further alerts him to check whether his account was indeed debited or credited as stated in the notice.

The point at which the agreement is actually (finally) terminated as contemplated in section 127(6)(b) and 127(8)(b) respectively, depends on whether there is any money that must be credited to the consumer's account pursuant to the sale of the goods: Where an amount is credited to the consumer's account and it exceeds the settlement value immediately before the sale and it appears that the credit agreement was double discounted[43] the credit provider is obliged to remit the excess amount to the Tribunal and the Tribunal may then make an order for

40 See s 129(4)(b)(ii) which provides that a credit provider may not reinstate or revive a credit agreement after the sale of any *property* that was surrendered in terms of s 127.

41 However, s 127(5) does not require the credit provider also to disclose the date of sale but it can be surmised that a consumer who receives a s 127(5) notice and detects a substantial discrepancy between the valuation of the goods and the price for which they were eventually sold will usually infer that either there was a long delay in selling the goods (which caused their value to depreciate) or that there existed some other problem relating to either the valuation of the goods or the sale thereof.

42 Incorrect calculation of the settlement value prior to the sale or the subsequent sale of goods contrary to s 127(4)(b) will in any event lead to an incorrect amount being debited or credited to the consumer's account.

43 In the sense that another credit provider also has a registered credit agreement with the same consumer in respect of the same goods.

the distribution of the amount in a manner that is just and reasonable.[44] Where there is no other credit provider who has a registered credit agreement with the same consumer in respect of the same goods, the credit provider is obliged to remit the excess amount to the consumer together with the section 127(5)(b) notice. In such an instance the agreement is then terminated upon remittance of that amount.[45] It is submitted though that section 127(6)(a) and (b) will only find application in rare instances.

Where there is a shortfall on the consumer's account after the sale of the goods, the credit provider may demand payment from the consumer of the remaining settlement value and this demand may be made when "issuing" the section 127(5)(b) notice. This notice, in addition to setting out the amounts mentioned in the subsection, may also incorporate a demand in terms of section 127(7) for payment of the outstanding balance on the agreement. Whilst this outstanding balance is not yet paid, the agreement is not yet terminated.

If the consumer fails to pay the amount demanded in terms of section 127(7) within 10 business days after receiving the demand notice, the credit provider is entitled to commence proceedings in terms of the Magistrates' Courts Act for judgment enforcing the agreement.[46] However, if the consumer pays the amount demanded after receiving a demand notice at any time before judgment is obtained under section 127(8)(a), the agreement is terminated upon remittance of that amount and no enforcement proceedings follow.[47]

Finally, some observations are also necessary regarding the consumer's right to dispute the sale of the goods: Section 128 can be used only if the consumer has been unable to resolve a disputed sale of goods directly with the credit provider or through alternative dispute resolution. Where these prerequisites to the use of the section are met, section 128 offers the consumer a "post-sale remedy" as its objective is to get the Tribunal to "review" the sale, as opposed to "preventing" the sale where, for example, there is a dispute about the sale price based on the valuation of the goods. The point is that although the valuation of the vehicle would inevitably play a role in considering whether goods were sold for the best price reasonably obtainable, review of a sale in accordance with section 128 is not a remedy that kicks in after receipt of a section 127(2) valuation notice and its purpose is most certainly not to stop or reverse a sale occasioned by a voluntary surrender of goods in terms of section 127. It can only be resorted to once the goods have actually been sold and the only relief it provides for is repayment of the difference between the sale price of the goods and what the Tribunal eventually regards as "the best price reasonably obtainable" for the goods. In this process, section 128 provides that the Tribunal has to decide whether the goods were sold "as soon as practicable" *or* "for the best price reasonably obtainable". Although these aspects are stated in the alternative it is clear that where the

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44 S 127(6)(a).

45 S 127(6)(b).

46 S 127(8)(a). There is some debate as to whether a consumer has to be given notice in terms of s 129(1)(a) prior to such enforcement proceedings. See Van Heerden para 12.8.3.1 for an overview of the conflicting opinions.

47 S 127(8)(b). No mention is made of payment of legal costs incurred in this court process. S 127(9) merely provides that interest is payable by the consumer at the rate applicable to the credit agreement on any outstanding amount demanded by the credit provider from the date of the demand until the date that the outstanding amount is paid.

goods were not sold as soon as practicable it may cause the goods to decrease in value and may result in those goods not being sold for the best price reasonably obtainable. It is of course also possible that the goods may have been sold as soon as practicable yet *not* for the best price obtainable, especially where there is a substantial difference between the sale price and the valuation of the goods or if the valuation was too low and the goods were sold for a low price due to the low valuation. One can thus argue that a substandard valuation of the goods will come back to bite the credit provider at this stage.

It is further submitted that section 128 affords the consumer redress outside the prohibitive cost and delay occasioned by otherwise having to approach a court to settle the disputed sale absent the opportunity to raise the issue in enforcement proceedings or alternatively as a measure to pre-empt unnecessary enforcement proceedings. It can be assumed that usually the consumer who triggers the section 127 process is already in default and out of pocket and cannot afford further financial strain, hence the legislature created the opportunity for review of the sale via a much less costly route. Although section 128 does not indicate a specific time frame within which the consumer has to utilise this remedy, it is submitted that the consumer should ideally utilise the remedy prior to enforcement proceedings being instituted by the credit provider.[48]

It is to be noted though that section 128 uses the word "may", indicating that the consumer is not obliged to use this procedure for review of a sale. It is further submitted that where the consumer is sued for an outstanding balance and he only at *that* stage raises the issue that the relevant goods were not sold in accordance with section 127 "as soon as practicable" or "for the best price reasonably obtainable", the court can decide the issue and does not have to postpone the proceedings in order for the consumer to approach the Tribunal to review the sale.[49]

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48 A number of Tribunal decisions have sought to clarify the application of s 128: In *Pillay v Wesbank* NCT/867/2010/128(1) (P) (NCA) the Tribunal held that the obligation to first attempt to resolve a disputed sale with the credit provider or through alternative dispute resolution is a separate requirement that must be complied with before the Tribunal considers the matter in terms of s 128(2). In *Yako v Mercedes Benz Financial Services (Pty) Ltd* NCT/4044/2012/128(1) (P) (NCA) it was held that the consumer has to adduce objective evidence of the value of the goods for purposes of a review in terms of s 128(1). In *Joubert v ABSA Bank Ltd* NCT/10685/2013/128(1) (P) (NCA) the Tribunal held that when considering the requirement in terms of s 128(1) there appears to be a link between s 128(1) and s 128(2). It remarked that the requirement would be rendered somewhat meaningless if the consumer was not required to specifically dispute the price of the goods or any delay in selling it. Thus the consumer must provide the credit provider with an opportunity to resolve the goods specifically regarding the sale price or delay in selling the goods. The Tribunal further indicated that the dispute lodged must match the basis of the application before the Tribunal and that a consumer cannot lodge an informal dispute regarding a delay in selling the goods and then (at the same time) lodge an application to review the price obtained for the goods at the sale.

49 Note, however, that where a matter to be dealt with in terms of s 128 is pending before the Tribunal at the time that a credit provider institutes court proceedings to recover an outstanding balance, it will trigger the operation of s 130(4)(d) which gives the court a discretion in such an instance to adjourn the matter, pending a determination of the proceedings before the Tribunal, alternatively to order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination.

4 2 Wide scope of application of section 127

4 2 1 Voluntary surrender by consumer under credit agreement to which goods relate

As indicated above, section 127 applies first and foremost where the consumer wishes an instalment agreement, lease agreement or secured loan to be terminated via the mechanism of voluntary surrender as provided for in the said section. It is submitted that the consumer himself must voluntarily trigger this process by means of a section 127(1) notice and that no third party who happens to be in possession of the goods to which the credit agreement relates, can purport to give such notice on behalf of the consumer unless specifically authorised to do so.[50] Once the section 127 process is put in motion by the consumer it is important that the credit provider complies with the various procedural obligations as set out in section 127. The agreement will then be terminated once the circumstances mentioned in either section 127(6)(a) or (b) or 127(8)(b) have occurred.

4 2 2 Goods attached pursuant to attachment order

Section 131 makes the provisions of section 127(2) to (9) and section 128 applicable in the context of an attachment order with respect to property[51] that is the subject of a credit agreement. In *Edwards v Firstrand Bank Ltd t/a Wesbank*[52] the Supreme Court of Appeal remarked:

> "Counsel for the appellant contended that the provisions of s 127(2) to (9) are *always applicable* whether there was a voluntary surrender of the goods or a forced repossession. He went further to suggest that the answer lies in s 131. Section 131 of the Act squarely answers the question whether section 127 is applicable at all in the positive."

It is submitted that this contention is indeed correct.

The implication of the incorporation of section 127(2) to (9) into section 131 is thus that the legislature also intended the same "due process" provided for in section 127(2) to (9), with the changes as required by the context,[53] to be followed in the event of repossession of property via an attachment order.[54] It also means that the consumer has the right, as provided for by section 128 discussed above, to approach the Tribunal regarding a disputed sale of such property.[55]

Thus, the credit provider, after having obtained the attachment order and having repossessed the goods, will have to follow the procedure dictated by section 127 regarding obtaining of a valuation of the goods, informing the consumer of the valuation, selling the goods as soon as practicable for the best price reasonably obtainable,[56] and accounting to the consumer for the proceeds before he can

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50 A third party who is in possession of the goods to which a credit agreement relates can, without judicial intervention, return same to the credit provider either out of his own volition or pursuant to payment of amounts owed in terms of a lien but such return *per se* does not constitute a surrender by the consumer for purposes of s 127.

51 For a discussion regarding "property " and "goods", see Coetzee 2010 *THRHR* 577.

52 [2016] 4 All SA 692 (SCA), 2017 1 SA 316 (SCA).

53 It is submitted that s 127(3) that relates to a non-defaulting consumer's right to withdraw a surrender of property will not likely find application in this scenario.

54 See Van Heerden para 12.8.3.1.

55 *Idem* para 12.8.4.2.

56 It is submitted that it is debatable whether s 127(3) would apply in such a situation and what its effect will be.

claim any outstanding balance under the credit agreement which he should then do as per the process provided for in section 127(7), (8) and (9). It is therefore clear from the incorporation of the process provided for in section 127(2) to (9) in the context of attachment orders, that is where the goods were repossessed *with* court intervention, that the intention of the legislature also was that the consumer's rights should be procedurally protected. After attachment of goods, the credit provider is thus obliged to follow a process aimed at enabling the sale of the goods as soon as practicable for the best price reasonably obtainable, and that by so doing, the consumer's outstanding debt obligation is mitigated.

As pointed out by Coetzee, section 131 only incorporates section 127(2) to (9) and not section 127(10), leading her to conclude that non-compliance with section 127(2) to (9) after goods were attached in terms of section 131 would not constitute an offence.[57] However, it is submitted that it follows by necessary implication that non-compliance with section 127(2) to (9) in such instance should actually constitute an offence as contemplated by section 127(10) and that section 131 should be amended to reflect same. Otherwise it would lead to the anomalous situation that a consumer who voluntary surrenders goods enjoys greater protection under the due process provisions of section 127(2) to (9) due to the threat of non-compliance constituting an offence but that a consumer whose goods have been repossessed via judicial intervention is afforded lesser protection despite the express incorporation of the exact same rights in the context of section 131 attachments.

4 2 3 Credit provider obtained return of goods from third party

Where a consumer is in default and the goods that are subject to a credit agreement are in the possession of a third party, for example, a vehicle that is left with a panel beater after having been involved in a collision or otherwise needing repairs, the credit provider will usually repossess its security from the third party. Two scenarios generally arise in this context, namely, that either the credit provider could have repossessed the goods from a third party via an attachment order issued by a court or the credit provider could have obtained return of the goods from a third party who voluntarily and/or without court intervention, handed those goods to the credit provider, for instance upon payment to discharge a lien.

Where goods are repossessed from a third party via an attachment order, it is clear that section 127(2)–(9) as explained above, will apply by virtue of its incorporation into section 131. However, where the goods are repossessed from a third party *without* a court order, the NCA does not expressly address the situation because such a situation does not constitute a voluntary surrender as envisaged by section 127 nor was there any attachment via a judicial process as contemplated by section 131. Usually in practice, after such a repossession from a third party, the credit provider will notify the defaulting consumer that he is in possession of the goods and it is submitted that generally in such instance the credit provider will cancel the agreement with the defaulting consumer if he had not done so already prior to the repossession.[58] It is submitted that after the

57 Coetzee 2010 *THRHR* 579.

58 Of course, this will not always be the case and it is conceded that in many instances the credit provider may accommodate the consumer and the agreement may be brought up to date and carried on with.

repossession of goods and in those instances where the credit provider had not yet cancelled the agreement, it is open to the consumer at this stage to provide the credit provider with notice to terminate the agreement in terms of section 127, in which event the "voluntary" procedure in accordance with section 127 will then apply further to the matter.

If, however, after repossession of the goods from a third party without a court order, the consumer *is* in default, the credit provider has cancelled the agreement and the parties can come to no arrangement regarding repayment or otherwise, the credit provider will usually want to sell the goods and recover the shortfall from the consumer. This is where matters become more complicated. The credit provider will not be able to just sell the goods – in the absence of a settlement agreement authorising him to do so, legal proceedings will first have to be instituted to confirm the cancellation of the agreement and the credit provider's entitlement to return of the goods – this procedure has to be followed to place the credit provider in a position to lawfully sell the goods. In practice, credit providers either approach the court for an attachment order (although they technically have the goods already in their possession and the sheriff merely attaches the goods where they are kept) or they issue a summons for cancellation or confirmation of cancellation of the agreement and return of the goods, obtain judgment for cancellation and issue a warrant of delivery for attachment of the goods. Where an attachment order is applied for the credit provider thereafter will have to allege in his pleadings compliance with section 127(2)–(9) and prove such compliance before he will be able to get judgment for the outstanding balance. This is clear from the provisions of section 131 read with section 130(3)(a) of the Act. Also, where the credit provider proceeds by way of summons to obtain eventual permission from the court (via judgment and attachment) to sell the goods, it is submitted that thereafter, when pursuing his claim for the outstanding balance, he will have to be able to demonstrate compliance with section 127(2) to (9) failing which a court will not be able (by virtue of section 130(3)(a)) to entertain a claim for the shortfall.

In such instance, it is submitted that the consumer should also have access to section 128 to dispute the sale of the goods if reasons for such a dispute exist.

4 2 4 Final remarks regarding wide scope of application of section 127

At first glance it appears that the provisions of section 127 need only be observed in two instances, namely, where the consumer himself surrenders the goods because he wants the credit provider to terminate the credit agreement; or where goods were repossessed in terms of an attachment order as provided for in section 131, in which event the credit provider is statutorily obliged to comply with section 127(2) to (9).

However, it is submitted that the implication of section 127 read with sections 130 and 131 is that the legislature intended consumers to be protected by the due process provisions contained in section 127(2)–(9) in instances where repossession of goods occurred without court intervention (such as strictly per a section 127(1) voluntary surrender but also where goods have been repossessed from a third party without a court order) as well as where it occurred pursuant to court intervention (as per section 131). It is thus submitted that the legislature, through the NCA, wanted to regulate the procedure for valuation and sale of goods that are subject to a credit agreement governed by the Act and it is further submitted that the implication is that this procedure should apply in *all* instances, regardless

of how the credit provider came into possession of goods, whether by voluntary surrender by the consumer or by means of an attachment order or whether the goods were surrendered to the credit provider by a third party subsequent to the credit provider paying a lien or otherwise. To hold that a credit provider is only obliged to follow the section 127(2)–(9) procedure where he came into possession of goods via a voluntary surrender by the consumer himself (as per section 127(1)) or an attachment order *strictu sensu* (as per section 131) goes against the clear objective of the Act to provide for due process regarding the valuation and sale of goods. Surely it could never have been the intention of the legislature that a consumer who voluntarily surrenders goods or from whom goods are repossessed via a court order should have the protection of the due process in section 127(2)–(9) but that the defaulting consumer who is liable for the outstanding balance relating to goods that have been returned by a third party (absent a voluntary surrender by the consumer) should not also be able to rely on due process regarding the valuation and sale of those goods. It is submitted that an interpretation that allows for such differentiation not only goes against the grain of the legislature's intention to provide blanket procedural protection to consumers in respect of the sale of goods under instalment sale and lease agreements and secured loans, but also offends the principle of equality as set out in section 9 of the Constitution.[59]

It is thus submitted that the process contemplated in section 127 transcends the boundaries of voluntary surrender initiated by the consumer, and in the interests of protecting consumers across the board, will always have to be followed where the credit provider wishes to sell goods that are subject to an instalment agreement, lease or secured loan, regardless of how the credit provider came into possession of those goods.[60]

4 3 Compliance with section 127

4 3 1 Recent developments in case law

Recent developments in case law suggest that the courts are becoming acutely aware of the importance of procedural compliance with section 127.

In *Firstrand Bank Ltd t/a Wesbank v Baliso*[61] the defendant contended that the plaintiff failed to allege that delivery of the section 127(2)(b) notice (which was sent by ordinary mail) took place in accordance with the guidelines stipulated in *Sebola v Standard Bank of South Africa*[62] and *Kubyana v Standard Bank of*

59 S 9 of the Constitution of the Republic of South Africa, 1996 provides that everyone is equal before the law and has the right to equal protection and benefit of the law and s 9(4) prohibits unfair discrimination.

60 As pointed out, Coetzee has remarked that s 131 appears to extend the application of the procedure in s 127(2)–(9) to property which includes both movables and immovables. Save to concede that this indeed appears to be a plausible interpretation, an interrogation into this issue is beyond the scope of this contribution.

61 [2015] ZAWCHC 146 (21 January 2015).

62 2012 5 SA 142 (CC) (hereinafter *Sebola*). The gist of the *Sebola* judgment was that in order to illustrate proper compliance with s 129(1)(a) where such notice was delivered to the consumer by post, the court set the requirement that the credit provider must furnish proof that the notice was sent by registered mail and that a track and trace report be provided indicating that the notice reached the correct post office, which post office would then have

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South Africa Ltd.[63] However, the High Court in *Baliso* indicated that in distinction to section 129 and 130 of the NCA, section 127(2) merely requires that a credit provider must give written notice to a consumer setting out the estimated value of the goods and any other prescribed information. It remarked: "There is no question of any requirement in respect of the s 127(2)(b)-notice that anything must be drawn to the notice of the consumer or that the notice must be 'delivered' to the consumer." The High Court stated that in its view there is a significant difference between the notice referred to in section 129(1)(a)[64] and 129(b)(i)[65] of the Act and the section 127(2)(b) notice and remarked:

> "[T]he first deals with the required procedure before debt enforcement can take place and the other with the surrender of goods by a consumer. One would have expected that a consumer surrendering a vehicle must realise that the vehicle will probably be resold. *Such a consumer is therefore in a position to look after his or her own interest and to enquire about the estimated value or any other relevant prescribed information.*"[66]

Thus, the High Court held that it is *not necessary* for a credit provider to allege in the summons claiming payment of an outstanding balance under a credit agreement, that a section 127(2) notice was delivered by registered mail subject to the requirements of the *Sebola* judgment.

The *Baliso* case subsequently served before the Constitutional Court.[67] Although the court dismissed the application for leave to appeal, the majority judgment (written by Froneman J) contains the following significant observations regarding section 127:[68]

> "The applicant [Baliso] argued that it was illogical to make a distinction between the manner of giving notice under section 127(2) of the Act, and that required under section 129(1), as the High Court did. He acknowledged that section 129(1)(a) served a different purpose to that of section 127(2), but submitted that the failure

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notified the consumer that a registered item was available for collection. See Van Heerden para 12.4.4.

63 2014 4 BCLR 400 (CC), 2014 3 SA 56 (CC) (hereafter *Kubyana*). Due to interpretational difficulties with the *Sebola* judgment the Constitutional Court revisited the aspect of notification in terms of s 129(1)(a) and qualified it by indicating that a reasonable consumer, when notified by the Post Office to collect a registered item, would do so. Thus, the Constitutional Court held that where a consumer acted unreasonably by not collecting a s 129(1)(a) notice that was sent to the correct Post Office and in respect of which a collection notice was sent to the consumer, the credit provider cannot be held not to have complied with the Act's requirement of notification in terms of s 129(1)(a). It also indicated that where a consumer who fails to collect a s 129(1)(a) notice after receiving a collection notification from the correct Post Office, has a reasonable explanation for not collecting such notice, he must provide an explanation in this regard. See Van Heerden para 12.4.4.

64 S 129(1)(a) requires the credit provider to deliver a notice to a defaulting consumer drawing his default to his attention and proposing 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.

65 S 129(1)(b)(i) refers to both the s 129(1)(a) notice and the notice to terminate a pending debt review in terms of s 86(10).

66 Author's emphasis.

67 *Baliso v FirstRand Bank Limited t/a Wesbank* 2017 1 SA 292 (CC).

68 Para 22.

> to comply with the latter had *even more serious consequences* for the consumer than the former. *There is much force in this*."[69]

The court then went on to state that "failure to comply with section 129(1) has only dilatory consequences . . . Failure to comply with the section 127(2) notice requirement also has the same dilatory consequences, *but it has a more serious effect as well*".[70]

The court remarked further:

> "[T]he section 127(2) notice setting out the estimated value of the goods thus provides the consumer with vital information about whether she is likely to benefit from the sale of the goods, or will still be liable for payment of some money to the credit provider after the sale. Without proper notice the consumer is *deprived of the opportunity of making the choice of whether to withdraw the termination of the agreement*. But it works to the detriment of the credit provider too. *If no proper notice is given, the provisions allowing for the sale of goods become inoperative and the credit provider's claim for repayment of outstanding monies in the case of a shortfall on the settlement value of the goods will fail. If the sale follows upon an invalid notice, a credit provider risks losing its claim for repayment of outstanding monies.* Put differently, *an invalid notice to the consumer may provide a consumer with substantive, not only dilatory, grounds to resist payment under those circumstances*."[71]

These observations by the Constitutional Court with regard to the importance of the valuation notice as per section 127(2), in so far as it bars a valid sale of the goods, clearly apply only in the context of a consumer who uses the process of voluntary surrender and who is *not* in default and has the right in terms of section 127(3) to decide whether he wants to withdraw from the section 127 process. As pointed out in the discussion above, where a consumer *is* in default when he triggers the voluntary surrender process the Act does not give him the option to withdraw his surrender in terms of section 127 and thus a consumer who *is* in default does not have the "preferential position" accorded by section 127(3) to a consumer who is *not* in default. Whether the Constitutional Court in *Baliso* (which dealt with a consumer who was in default) appreciated the difference in position for purposes of section 127, between a consumer who *is* in default and the rare consumer who is *not* in default, is unclear, but nevertheless, it can be agreed that non-compliance with section 127 does indeed have not only dilatory but also other more serious consequences, as discussed in more detail below.[72]

4 3 2 Observations regarding compliance with section 127

4 3 2 1 Effect of non-compliance with section 127 on rights of consumer

As submitted above, the procedure in section 127(2)–(9) has to be observed by the credit provider regardless of whether he obtained repossession of goods due to a "pure" voluntary surrender from the consumer or by means of an attachment

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69 Author's emphasis.

70 Paras 23 24. Author's emphasis.

71 Para 27. Author's emphasis.

72 Whether these consequences are indeed more serious than those following non-compliance with s 129(1)(a) is indeed debatable because one can indeed conceive of instances where non-compliance with s 129(1)(a) may also for instance lead to goods being sold unlawfully. However, for purposes of this contribution it is not necessary to reach a definitive conclusion on this issue.

order as contemplated in section 131 or otherwise from a third party. There are many ways in which a credit provider can fail to comply with section 127: he can force a surrender upon a consumer; he can fail to have the goods valued or fail to have them valued timeously; he can fail to inform the consumer of the valuation or that the consumer can withdraw from the process if he is *not* in default; the credit provider can fail to sell the goods as soon as practicable and/or for the best price reasonably obtainable or he can sell goods before the expiry of the time period in which a non-defaulting consumer can withdraw; the credit provider can fail to give the consumer a notice in terms of section 127(5)(b) or he can give such notice but fail to comply with the specific content requirements; he can fail to comply with section 127(6) (in the rare instances in which it may apply); he can fail to give a demand as required by section 127(7); or he can proceed with enforcement prior to expiry of the demand period or he can levy interest contrary to section 127(9).[73]

The main forms of non-compliance that are addressed in this contribution relate to failure to give the consumer notice of the valuation of goods as contemplated by section 127(2) and/or failure to give the consumer notice of the sale price and other matters as contemplated in section 127(5)(b). As discussed above, these two notices are extremely important to facilitate the smooth running of the section 127 process. The section 127(2) valuation notice is part of the "checks and balances" that are aimed at ensuring that the goods are not sold below their worth and also serves as an important point of reference should a consumer later wish to approach the Tribunal in terms of section 128 to review a sale that did not occur as soon as practicable or for the best price reasonably obtainable or to dispute an outstanding amount in court on the aforesaid basis. Where the consumer is *not* in default the giving of the valuation notice is even more important as such a consumer can use the valuation to decide whether to exit the section 127 process or not. If he does decide to exit the process, the goods have to be returned and cannot lawfully be sold by the credit provider. Thus the receipt of the section 127(2) notice is actually a Rubicon event for the consumer who is *not* in default as it informs his decision to withdraw from the section 127 process and avoid the sale of the goods or whether to carry on with the section 127 process and allow the credit provider to sell the goods. Failure to give the non-defaulting consumer notice of the valuation as per section 127(2) will thus have the effect that any subsequent sale of the goods is unlawful. Basically it means that the non-defaulting consumer is then incorrectly treated similar to a consumer who *is* in default at the stage that the section 127(2) notice is supposed to be given. As pointed out by the court in *Baliso*, the fact that a sale is unlawful bars the credit provider from lawfully recovering any shortfall on the credit agreement after the sale.

The position of the consumer who *is* in default at the stage that notice of the valuation ought to be given to him, is significantly different as the section 127(2) notice "merely" serves to inform him of the valuation and thus provides him with information that he can use after the sale of the goods to dispute the price realised at the sale. However, although it may not have such a drastic effect as barring the sale of the goods by the credit provider, the giving of a valuation notice

73 These examples are not meant as a *numerus clausus* of instances of non-compliance with s 127.

to a consumer who *is* in default is still very important even though it does not facilitate withdrawal from the section 127 process.

The section 127(5) notice is also pivotal, as it provides the consumer (a consumer who was *not* in default but who decided to proceed with the surrender process after receipt of a section 127(2) notice as well as the consumer who *is* in default and accordingly obliged to carry on with the section 127 process) with information regarding the sale price because prior to receiving this notice he will not know whether he has grounds to dispute the subsequent sale of the relevant goods. Only when he gets the section 127(5) notice can he see whether there is a discrepancy between the valuation of the goods and their sale price serious enough to warrant him approaching the Tribunal in terms of section 128 or otherwise to dispute the outstanding balance if sued, given that such discrepancy will materially influence any shortfall for which he would still be liable. Even if no such discrepancy exists, the section 127(5)(b) notice is important because only upon receipt of such notice is the consumer informed of the amounts for which he is still liable. Given that, in the event of a shortfall, section 127(7) provides for a letter of demand to accompany the section 127(5)(b) notice, it will mean that there is also a possibility that a consumer who is not provided with notice in terms of section 127(5)(b) may not get the letter of demand mandated by section 127(7) prior to enforcement proceedings being instituted against him. This means that he will not be able to make use of the opportunity to pay the shortfall and thereby terminate the agreement and so to avoid being dragged to court at great cost for the recovery of the shortfall. Alternatively he will not be in a position prior to the institution of enforcement proceedings to approach the credit provider to resolve a dispute relating to the sale of the goods and in the alternative to approach the Tribunal for a review of the sale which could likely have had the effect of obviating the need for further court proceedings to recover the shortfall.[74] Where the consumer is in fact sued for the outstanding balance, the lack of information about the aspects mentioned in the section 127(5)(b) notice may even compromise his ability to formulate his plea or otherwise add another costly layer to the litigation he is involved in based on the procedures he may have to follow in order to obtain such information.

It is therefore clear that from the consumer's perspective the consequences that may follow where there is lack of proper compliance with the notice requirements in section 127(2) and/or section 127(5) are quite severe and especially that the severity of non-compliance with section 127(2) differs depending on whether the consumer was in default or not at the time that the credit provider was supposed to give the consumer a section 127(2) valuation notice.

4 3 2 2 Sanctions for non-compliance with section 127

As a point of departure it should be noted that where section 127 refers to something that the credit provider is obliged to do, such as valuation of the goods, sale thereof and the giving of notice in terms of section 127(5), the word "must" is

74 An order of the Tribunal has the same status as an order of the High Court (s 152(1) of the NCA). It is likely that where the Tribunal reviews a sale and determines the amount that has to be credited to the consumer's account, the parties will agree on how the amount should be repaid and thus it may not be necessary for further court action to recover the shortfall.

used indicating the peremptory nature of these obligations.[75] The peremptory nature of these provisions is further fortified by the fact that non-compliance with section 127 is regarded in a very serious light, as is clear from section 127(10), which makes it an *offence* for a credit provider to act "in a manner contrary" to section 127 and thus criminalises such conduct.[76] None of the other important notice provisions in the Act (for example, the pre-enforcement notices in section 129(1)(a) and section 86(10)) carries such a severe penalty.[77] Although not dealt with specifically under Part B of Chapter 8 of the Act that deals with offences, it appears that upon conviction, the credit provider who contravenes section 127 is liable to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.[78] Exactly how broadly a court will interpret the provisions of section 127(10) is unclear but given its wide formulation it is likely that anything that the credit provider does that is materially *contrary* to the obligations imposed on the credit provider by the section, such as forcing the section 127 process upon a consumer or failing to obtain a valuation or selling a goods without informing the consumer of the valuation prior to the sale or failing to sell the goods as quickly as possible and/or at the best price reasonably obtainable, or failing to account to the consumer after the sale, may meet the requirements for the offence. A credit provider who engages in conduct that constitutes an offence may also suffer reputational damage due to its involvement in conduct that has been criminalised.

In addition to committing an offence, it should further be noted that as a result of section 130(3)(a) as stated above, a court will not also be able to determine (that is, adjudicate) a matter where there was non-compliance with section 127. Section 130(3)(a) makes it clear that non-compliance with section 127 triggers the operation of section 130(4)(b) of the Act. It appears that in the event of non-compliance the court has no discretion to deviate from the process prescribed by section 130(4)(b) given the peremptory nature of this subsection that contains the civil sanction for non-compliance with section 130(3)(a) (which *inter alia* refers to non-compliance with section 127). In such an instance the court cannot determine the matter but *must* make an order adjourning the matter and setting out the steps the credit provider must complete before the matter may be resumed.[79] Thus non-compliance with section 127 has a dilatory effect on the proceedings and, depending on the nature of the specific non-compliance, might even foreclose the credit provider from successfully pursuing enforcement proceedings to finality if he is unable to meet the steps ordered by the court in terms of section 130(4)(b). This clearly spells trouble for a credit provider who sold goods unlawfully after failing to provide a section 127(2) notice to a consumer who was *not* in default at the stage that he should have been given such notice.

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75 See also Coetzee 2010 *THRHR* 572 who indicates that a credit provider is obliged to "meticulously follow" the prescribed procedure in s 127. She also remarks that s 127 "points to consumer protection, by providing for additional consumer rights. These rights include keeping consumers informed during each step of the process" (579).

76 Author's emphasis.

77 See also Otto 2015 *THRHR* 494 who notes that s 17 of the Usury Act 73 of 1968 and s 23 of the Credit Agreements Act 75 of 1980 declared *any* contravention of these Acts punishable as an offence.

78 S 161(b).

79 Van Heerden para 12.9.3.

4 3 2 3 Manner of giving notice in terms of section 127

Given these dire consequences of non-compliance with the notice requirements in section 127 it remains to be considered how these very important notices must be given to the consumer in order to constitute compliance with the Act. For purposes of the valuation notice in terms of section 127(2) the Act states that the credit provider "must *give* the consumer written notice", section 127 (3) refers to "receiving" of the valuation notice and for purposes of informing the consumer of the relevant amounts as mentioned in section 127(5)(b) it is stated that the credit provider "must *give* the consumer notice". Section 127(7) also refers to the "issuing" of the section 127(5)(b) notice.

Apart from indicating that the relevant notices must be in writing, section 127, however, does not state *how* the "giving" of the notices must occur. It should specifically be noted that the section uses the word "give" and not "deliver". The NCA does not contain an explanation of "giving notice". There is also, unlike in the case of a section 129(1)(a) notice (which has to be read in conjunction with section 130, which makes it clear that the section 129(1)(a) notice has to be "delivered") no similar provision that can be read with section 127 to facilitate the interpretation of "giving" notice as meaning "delivering" notice.[80] Thus, "giving notice" has to be afforded its ordinary grammatical meaning which means "to inform or warn someone of something".[81] To "give" means to "freely transfer possession of something to someone, to hand over to".[82] However, it is submitted that logic dictates that the *giving* of the written notices can be equated with *delivering* such notices, even in the absence of a specific provision in section 127 or a related section that specifically indicates that such notice has to be delivered. On this construction it is argued that, in so far as the notices that are required to be given by the credit provider are concerned, the provisions of section 65 of the Act come into play which states that every document that is required to be delivered *to a consumer*[83] in terms of the Act must be delivered in the prescribed manner, if any. Where no manner has been prescribed for the delivery of a particular document to a consumer (such as in the case of section 127), the person required to deliver that document must make the document available to the consumer through one or more of the following mechanisms: 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; by fax; by e-mail; or by printable web-page; and deliver it to the consumer in the manner *chosen by the consumer from the aforementioned options.* This means that in the credit agreement that was initially entered into between the parties the consumer should have been afforded an opportunity to select how he wishes to be "given notice" of aspects in respect of which the NCA requires the credit provider to give him notice.

It is further submitted that given the "personalised nature" of the section 127(2) and (5)(b) notices, the two methods best suited for proper delivery capable of "easy" proof would be to have the notice either delivered by hand or by mail. Although section 65 refers to ordinary mail, it is submitted with reference

80 See *idem* para 12.4.4.
81 As per the *Free dictionary* available at http://bit.ly/2ipSONz, accessed on 29 July 2017.
82 As per the *Collins dictionary* available at http://bit.ly/2lTno4O, accessed on 29 July 2017.
83 Author's emphasis.

to *Sebola* and *Kubyana* that, given the importance of the section 127(2) and (5) notices, where the option of sending them by mail is chosen by the consumer, they should be sent by registered mail, being a more reliable method of postal delivery and also one that facilitates proof of compliance. Seeing that compliance with the notice requirements in terms of section 127 attracts consequences (including criminal consequences) that are arguably more dire than those attracted by non-compliance with section 129(1)(a) of the Act, it can be argued that the requirements for delivery by registered mail for section 127 notices should at least be on par with those for delivery by registered mail of a section 129(1)(a) notice. Therefore, when one has regard to the legal development in *Sebola* and *Kubyana* regarding "drawing the default to the notice of the consumer in writing" as required by section 129(1)(a) and the requirements set by the courts requiring a "track and trace "report indicating that at least the notice reached the correct post office, thus triggering the "presumption" that the said post office would dispatch a notice to the consumer to collect the registered item and that a reasonable consumer would act accordingly, one could ask whether it is really necessary to split hairs by differentiating between "giving notice" and "drawing . . . to the notice of the consumer" as used in section 127(2) and (5)(b) and section 129(1)(a) respectively. When comparing the purposes of the two sections the following is pertinent: section 129(1)(a) affords the consumer an opportunity, prior to a credit agreement being enforced, to avoid such enforcement through either bringing payments up to date or having a dispute between the parties resolved. The notices in terms of section 127(2) and (5(b)) inform a consumer of the valuation of the goods as well as the sale price and other relevant information so that where there are grounds for disputing whether the goods were sold as soon as practicable for the best price reasonably obtainable, he can do so by approaching the Tribunal to review the sale in terms of section 128. Also, it must not be forgotten that section 127 facilitates the eventual termination of the relevant credit agreement. So, a consumer may also receive the section 127(2) notice and note the valuation, compare it later with the section 127(5)(b) notice and agree with the sale price and other amounts mentioned therein and pay any shortfall demanded of him, in which event the agreement will be terminated and no court proceedings will follow. It is submitted the latter is ideally the outcome that the legislature had in mind when section 127 was enacted, namely, that using section 127 appropriately and successfully (which requires proper compliance by the credit provider) would put the matter to bed without the cost and protraction of having to approach the courts for termination of the agreement. Thus, in this sense, section 127, like section 129(1)(a), aims to achieve an extra-curial disposal of the matter although for different purposes. Finally, even though it is likely to be a rare occasion, sight must not be lost of the fact, as pointed out, that a consumer who is *not* in default when surrendering goods (and at the stage that the goods are valued) has the right to withdraw his surrender upon receipt of the section 127(2) valuation notice and that not affording him such right impacts directly on the validity of the subsequent sale of the goods.

Having regard to the purpose of section 127(2) and (5)(b) respectively and the fact that each of these notices is vital to inform the consumer of information that he can act on to protect his interests, be it through exiting a voluntary surrender process if he is *not* in default or otherwise having the sale reviewed, or paying the shortfall to terminate the agreement and so to avoid litigation or to be able to dispute the claim for the outstanding balance in court proceedings – it is evident that it is implied in section 127 that the section 127(2) and (5)(b) notices should

come to the attention of the consumer. To argue otherwise would make a mockery of the section 127 process. However, as illustrated by *Sebola* and *Kubyana*, the consumer also has a determining role to play in the context of notices coming to his attention: if he unreasonably thwarts the attempts by the credit provider to deliver a notice to him, the credit provider cannot be blamed for the fact that the notice has not come to the attention of such unreasonable consumer. On a practical level it would mean that the notices in terms of section 127(2) and (5)(b) should either be delivered by hand to the consumer's chosen *domicilium* address or sent to such *domicilium* address by registered mail. It can be expected that in practice credit providers will generally get consumers to agree to delivery by registered mail. In such event it is submitted that the credit provider should then provide further proof of compliance by means of a track and trace report that the notices reached the correct post office. Where the notices are not collected by the consumer the credit provider will then be able to allege that, having reached the correct post office, a notice to collect the registered item would in each instance have been sent to the consumer by the post office and accordingly that the consumer's failure to collect the said registered items was unreasonable. Where a consumer has a good explanation for his failure to collect the notices, he will be allowed to raise same. If not, or if he fails to respond to the aforementioned allegation, the credit provider should be held to have complied with his obligations regarding the notices in terms of sections 127(2) and/or 127(5)(b).

The argument can also be made that where the NCA requires a credit provider to give a notice to a consumer it can be assumed that the legislature actually regarded the notice as important, whatever its purpose may be, and intended that the notice should come to the consumer's intention regardless of the fact that the words of a specific section of the Act do not expressly specify as much. Why else would there be statutory notice requirements if it does not matter whether or not the notice comes to the attention of the consumer? The Constitutional Court in *Sebola* and *Kubyana* has already grappled with the issue of whether the section 129(1)(a) notice actually has to come to the notice of the consumer to constitute proper compliance with the NCA. It is clear from those cases that generally the most balanced approach to conveying a notice to a consumer without undue hardship to the credit provider and without protraction and exceedingly high costs that in the end would prejudice not only that consumer but also other consumers seeking access to credit, would be the methods as suggested in *Sebola* and as further interpreted in *Kubyana*. This argument is equally valid in the context of the section 127(2) and (5)(b) notices.

5 CONCLUSION

It appears that there is more to section 127 than initially meets the eye. As a result of the statutory incorporation of section 127(2)–(9) into section 131 it has a much broader scope of application than merely that set out in the section itself. Its purpose and the negative impact that non-compliance with its procedures can have on the rights of consumers further inform the necessity to comply strictly with the process envisaged by the section, especially in so far as the notification requirements are concerned. Although not stealing the procedural limelight as much as section 129(1)(a) has done since the NCA came into operation, it is nevertheless clear that section 127 is as important, if not more important, than section 129(1)(a) and that credit providers should take care to comply with its processes and notice requirements.