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**The right of credit consumers to surrender the goods in terms of the
National Credit Act 34 of 2005**

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SUMMARY

The National Credit Act (“NCA” or “Act”) has been hailed for its robust protective measures that seek to protect consumers entering into credit agreements with credit providers. The manner in which the Act protects consumers is multifaceted, however, the scope of this study is limited to the provisions of section 127. Pertinent is the extraordinary right of a credit consumer to cancel credit agreements specified in the Act and to rid himself of the goods forming the subject of the particular agreement through the surrender of such goods. Thus, the section 127 right permits the termination of the credit agreement in advance, before the date agreed on in the agreement for its termination and entails several benefits for the consumer. The provisions of section 127, which afford substantive and procedural protection to credit consumers, curtail the right of credit providers under the common law to seek recourse on the basis of repudiation of the contract by the consumer.

Section 127, and in particular its procedural protection measures such as the question how notices in terms of the section must be brought to the consumer’s attention, came up for judicial scrutiny on several occasions. The dissertation, with the focus on the provisions of section 127 and the protection it affords to consumers, *inter alia* in respect of the alleviation of over-indebtedness and the prevention of contractual default, identified *lacunae* in the National Credit Act.

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Introduction

The National Credit Act,¹ the consumer credit enactment² currently effective in South Africa, has been hailed for its robust protective measures that seek to protect consumers entering into credit agreements with credit providers.³ Some of its main purposes are “to provide for the general regulation of consumer credit”,⁴ and “to protect consumers”.⁵ Although the manner in which the NCA protects consumers is multifaceted,⁶ the scope of this study will be limited to the provisions of section 127 of the Act, entitled “Surrender of goods”. Pertinent is the consumer’s extraordinary right, “namely to rid himself of his agreement, when goods are involved, by unilaterally deciding to return the goods to the credit provider so that they can be sold by the credit provider again in order for the consumer’s account to be settled”.⁷ The section 127 right, which may be exercised by a consumer at any point during the existence of the particular credit agreement, has limited application as far as the “goods” are concerned. The provisions of section 127 are, by their very nature, limited to an instalment agreement, a secured loan and a lease of movable goods, which are subject to the National Credit Act.⁸

Section 127(1)-(9) provides in a nutshell that a consumer, who concluded any of the aforementioned credit agreements, whether the consumer is in default in terms of his credit agreement or not, may elect to give written notice to the credit provider to cancel

¹ Act 34 of 2005, hereafter “National Credit Act”, “NCA” or “Act”. Reference to sections and regulations herein will be made in accordance with the Act, unless stipulated to the contrary. The NCA became effective on 15 March 2005 and repealed and replaced the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980. See Otto and Renke in Scholtz (ed) *Guide to the National Credit Act* (2008) par 1.3.6.

² The NCA is in other words the legislative enactment that protects consumers to whom credit is granted. “Credit” is the deferral of payment. See s 1.

³ Vessio “Section 127 of the National Credit Act: A form of statutory repudiation – How it modifies the common law” 2016 *Speculum Juris* Vol 30 Part 1 67.

⁴ See the Preamble to the NCA.

⁵ See the introduction to s 3, which sets out the NCA’s objectives. See also Coetzee “Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005” 2010 *THRHR* 569.

⁶ The NCA affords protection to credit consumers in three stages, pre-agreement, in the contract document and after the conclusion of the credit agreement.

⁷ Otto and Renke in Scholtz (ed) par 9.5.4.1.

⁸ See s 127(1), discussed in par 2.2 below. See also Otto and Renke in Scholtz (ed) par 9.5.4.1 and Coetzee 2010 *THRHR* 570.

the agreement, and to surrender the goods forming the subject of the agreement to the latter.⁹ After the surrender of the goods, the credit provider must obtain an estimated value of the goods, which the consumer must be informed of. Upon receipt of the value, the consumer, if he was not in default at the time of the surrender, may request the return of the goods to him and continue with the credit agreement. However, a consumer who was in default upon the surrender of the goods, may not request that the goods be returned to him. In the latter case, or where a consumer who was not in default when surrendering does not want to continue with the credit contract, the credit provider must sell the goods to a third party for “the best price reasonably obtainable”. The sale is followed by a simple process in terms whereof the consumer’s account is debited or credited with the proceeds of the sale, less permissible expenses. The consumer must be informed of the settlement value of his agreement immediately before the sale and of the proceeds of the sale. If the consumer’s account is credited by the credit provider after the sale and there is a surplus,¹⁰ the balance must be paid by the credit provider to the consumer, which will bring the credit agreement effectively to an end. However, if there is a shortfall, the consumer must be requested to pay the shortfall¹¹ (on a voluntary basis) to the credit provider. If the consumer fails to do the latter, the credit provider is empowered to enforce the payment of the shortfall in a court. Upon payment of the shortfall by the consumer, the credit agreement is terminated.

Section 127 is thus a statutory right afforded to the credit consumer to “repudiate”¹² certain credit agreements. Vessio also submits that in terms of section 127 a consumer is statutorily entitled to repudiate a contract without having regard to whether such repudiation is wrongful or not.¹³ Stated differently, this means that a consumer party to a credit agreement that is in the form of either an instalment sale, secured loan or lease agreement may repudiate such an agreement at any time during the subsistence of the agreement, irrespective of whether the reason for such repudiation is legitimate

⁹ Unless the credit provider, for whatever reason, is already in possession of the goods.

¹⁰ The amount the account is credited with, exceeds the settlement value of the account before the sale.

¹¹ The amount the account is credited with, is less than the settlement value of the account before the sale.

¹² Repudiation is a form of breach of contract in terms of the common law, in terms of which a party to a contract, “by his words or conduct, and without lawful justification, communicates to the other [party] his unequivocal intention to reject his contractual duties”. See Nagel *et al Commercial Law* (2019) 136. See also Van Heerden “The importance of section 127 of the National Credit Act 34 of 2005” 2018 *THRHR* 239.

¹³ Vessio 2016 *Speculum Juris* Vol 30 Part 1 70.

or not. The effect of this is that a consumer does not commit a breach of contract when exercising their right in terms of the provisions of section 127 of the Act. Consequently, this constitutes a statutory deviation, both substantively and procedurally, from the common law principles pertaining to breach of contract.

The section 127 right, due to its unilateral nature, curtails the rights of a credit provider under the common law to seek recourse on the basis of repudiation of the contract on the part of the consumer.¹⁴ It is submitted that this statutory curtailment of the right of the credit provider to rely on the common law remedies is linked to the purposes of the Act vis-à-vis the consumer, particularly as it relates to consumer protection,¹⁵ the avoidance of over-indebtedness¹⁶ and the discouragement of “contractual default by consumers”.¹⁷

Although the Act introduces a mechanism under which a consumer may legitimately repudiate a contract, it further provides for processes to be followed by the credit provider as well as the consumer when a surrender of goods occurs.¹⁸ Non-compliance with the procedural requirements, particularly as it relates to the credit providers, has the effect of prohibiting the credit provider from enforcing their rights under the credit agreement.¹⁹ The effect of non-compliance has a far-reaching impact in that it manifests irrespective of whether the consumer is in default under the credit agreement or not. Although the Act is well-intentioned in respect of the consumer, it does not seek to disregard the rights of the credit provider. Instead, in accordance with section 3(d) of the Act,²⁰ it seeks to balance the rights and obligations of both the consumer as well as the credit provider by introducing processes, insofar as it relates to the surrender of goods, that will ensure that the pendulum does not unjustly sway towards one side of the equation.

¹⁴ Vessio 2016 *Speculum Juris* Vol 30 Part 1 67.

¹⁵ See the introductory sentence to s 3, which makes it clear that “to protect consumers” is one of the main aims of the Act. The other objectives are “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 industry”. S 3(a)-(i) sets out various sub-objectives to give effect to the aforementioned main goals of the Act.

¹⁶ “Over-indebtedness” is defined in s 79(1) of the Act as the consumer being unable to fulfill all his obligations in terms of all his credit agreements in a timely manner, *inter alia* by having regard to the consumer’s “financial means, prospects and obligations”, and likelihood to pay his instalments in a timely manner, indicated by his debt repayment history.

¹⁷ S 3(c)(i) and (ii) respectively.

¹⁸ See above. These processes will be discussed in more detail in Chs 2 and 3.

¹⁹ Van Heerden 2018 *THRHR* 240.

²⁰ S 3(d) aims to promote equity in the credit market, “by balancing the respective rights and responsibilities of credit providers and consumers”.

The balance between the rights and duties of the credit provider and consumer is also illustrated in terms of section 128 of the NCA. It has already been mentioned that when the credit provider eventually sells the goods, he must do so “for the best price reasonably obtainable”. Section 128 paves the way for a consumer who is not satisfied with the proceeds of the sale of the goods to be compensated by the credit provider. If the consumer cannot settle the dispute in respect of the sale with the credit provider amicably or through the intervention of an alternative dispute resolution agent, the National Consumer Tribunal²¹ could be approached to review the sale of the goods.

The section 127 surrender of goods is closely linked to debt enforcement in terms of Chapter 6 Part C²² of the National Credit Act. It has been mentioned that a credit provider may enforce a shortfall if the consumer does not pay the latter voluntarily.²³ In addition, section 129, entitled “Required procedures before debt enforcement”, in section 129(3) provides for the re-instatement or revival of a credit agreement in arrears by the credit provider, provided that the latter has not cancelled the agreement and that the consumer has remedied the default.²⁴ However, in terms of section 129(4) re-instatement of an instalment agreement, lease or secured loan is no longer possible after the goods have been sold pursuant to its surrender in terms of section 127.

The heading of section 130 is “Debt procedures in a Court”. In terms of section 130(3) a court may only determine the matter serving before it if the court is satisfied, where section 127 is involved, that the proceedings in terms of the latter have been complied with. The court must also be satisfied that the credit provider has not approached the court to enforce its debt despite the fact that the consumer has surrendered the goods and that the goods have not been sold yet.²⁵ If this happens, the court must adjourn the matter and make an order which sets out the steps the credit provider has to follow before the matter may be presumed.²⁶

Section 131, with the title “Repossession of goods”, concerns an attachment order by a court after having been approached by a credit provider to enforce its debt in terms

²¹ The “NCT” or “Tribunal”.

²² Ss 129-133.

²³ The credit provider is empowered to do this in terms of s 130(2)(a) and (b).

²⁴ For a discussion of re-instatement, see Van Heerden in Scholtz (ed) par 12.10; and Brits, Coetzee and Van Heerden 2017 *THRHR* “Reinstatement of credit agreements in terms of the National Credit Act 34 of 2005” 177–197.

²⁵ S 130(3)(c)(ii)(aa).

²⁶ S 130(4)(b).

of Chapter 6 Part C of the Act. If any goods that are the subject of (any) credit agreement are attached in terms of such an order, the provisions of sections 127(2) to (9), and 128, apply in respect of the goods so attached.

Section 127, and to a lesser extent section 128, have since the coming into operation of the National Credit Act been the subject of academic publications and a number of court decisions. The courts *inter alia* made decisions in respect of the delivery of essential notices to the consumer in terms of section 127, and whether these notices must reach the consumer in order to be effective.

1.2 Research statement

The aim of my dissertation is to evaluate the provisions of sections 127 and 128 of the National Credit Act, which, as stated in the preceding sub-paragraph, introduced the “Surrender of goods” process” in South African consumer credit legislation. The ultimate aim is to determine whether the Act provides sufficient protection to consumers in respect of this process, and whether the section 127 procedure assists consumers who are over-indebted and/or in default in terms of their credit agreements. The aforementioned will be done in accordance with the opinions of academic writers and selected case law.

1.3 Research objectives

The following research questions have been identified in relation to the mentioned research statement of this dissertation:

1.3.1 Does section 127 adequately protect consumers, having regard to the purposes of the Act in relation to consumer protection and the avoidance of consumer over-indebtedness and contractual default?

1.3.2 To what extent does section 128 of the NCA provide recourse to a consumer pursuant to the sale of goods?

1.4 Delineations

The interrelationship between the surrender of goods in terms of section 127 and debt enforcement in terms of Chapter 6 Part C of the National Credit Act will not be discussed in detail in the dissertation, but will only be mentioned where required by the context of the study. However, the re-instatement of credit agreements in terms of section 129(3) and (4), and the forced surrender or repossession of goods and the application of sections 127(2) to (9) and 128 in that respect in terms of section 131 of the Act, fall outside the ambit of this dissertation.

1.5 Overview of chapters

This dissertation will consist of four chapters, which will entail the following:

1.5.1 Chapter 1 provides the introduction and background to the dissertation, and contains its research statement and objectives, overview of chapters, delineations and definitions of frequently used concepts.

1.5.2 Chapter 2 details and outlines the surrender of goods procedure in terms of section 127 of the Act. The provisions of sections 128 are also considered in the chapter.

1.5.3 Selected court decisions in respect of sections 127 are discussed in Chapter 3.

1.5.4 Chapter 4 concludes the dissertation and contains my final remarks.

1.6 Terminology

In what follows, the definitions in section 1 of the National Credit Act of frequently used terms or concepts in the dissertation are provided.

“**agreement**” includes an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties;

“**credit agreement**” means an agreement that meets all the criteria set out in section 8;

“**consumer**”, in respect of a credit agreement to which this Act applies, means -

- (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 direction money is advanced or credit granted under any other credit agreement;

“credit provider”, in respect of a credit agreement to which this Act applies, means -

- (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;
- (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.

1.7 Reference techniques

In my dissertation the masculine form will be used when referring to a natural person as consumer and “it” when a credit provider is referred to. The reason for the latter is that credit providers in practice are usually juristic persons, such as companies.

CHAPTER 2

SURRENDER OF GOODS IN TERMS OF THE SECTION 127 OF THE NATIONAL CREDIT ACT

2.1 Introduction

Chapter 2 entails a discussion of the “Surrender of goods” process in terms of section 127 of the National Credit Act, and of section 128, which are contained in Part B of Chapter 6 of the Act. It has already been mentioned that section 127 empowers a credit consumer to terminate selective credit agreements in advance, before the date agreed upon by the parties to the agreement for its termination, without complying with the terms of the agreement in totality.²⁷ Section 128 concerns resolving a disputed sale in terms of section 127, and the payment of compensation to the consumer under certain circumstances.

Section 127 is lengthy and will be discussed subsection by subsection (or per group of subsections) in this chapter with reference to authorities, excluding case law. Selected court cases are addressed in Chapter 3. Attention will not be paid to the time periods within which the credit provider or consumer must conduct a subsequent step in the section 127 procedure. It suffices to say that all these periods are “business days”, which means Saturdays, Sundays and public holidays are excluded. However, it is important to note that if a number of business days are provided for between the occurrence of two events, for instance the consumer’s written notice to the credit provider to terminate the credit agreement and the written notice to the consumer with the estimated value of the goods, the last-day-in, first-day-out (“LIFO”) principle applies.²⁸ In the context of my aforementioned example this means that the day on which the consumer gives written notice to the credit provider to terminate the credit agreement is excluded and the number of business days (in this case ten) will start to run the day thereafter. However, the day upon which the credit provider gives notice to the consumer of the estimated value of the goods is included and forms part of the ten business days. Attention will also not be paid to detail that is self-explanatory, for instance “or within such other period or at such other time or place as may be agreed

²⁷ Otto and Renke in Scholtz (ed) par 9.5.4.1.

²⁸ S 2(5).

with the credit provider”.²⁹ Lastly, it should be noted that the legislature did not promulgate any regulations in terms of the NCA in respect of sections 127³⁰ or 128.

2.2 Section 127(1)

Section 127(1) of the NCA provides as follows:³¹

- (1) A consumer under an instalment agreement, secured loan or lease -
 - (a) may give written notice to the credit provider to terminate the agreement; and
 - (b) if-
 - (i) the goods are in the credit provider’s possession, require the credit provider to sell the goods; or
 - (ii) otherwise, return the goods that are the subject of that agreement to the credit provider’s place of business during ordinary business hours within five business days after the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider.

The use of the word “may” creates the possibility for a credit consumer to terminate his credit agreement and to surrender the goods, forming the subject of the credit agreement, to the credit provider, unless the latter is, for whatever reason, already in possession of the goods.³² The drafting of section 127(1)(a), “may give written notice to the credit provider to terminate the agreement”, could create the impression that the consumer requests the credit provider in writing that the credit provider should terminate the agreement. However, it is the consumer that terminates the agreement in writing.

Written notice to the credit provider to terminate the credit agreement is not the only requirement to put the section 127 process in motion. The consumer must also require the credit provider to sell the goods, if the latter is in possession of the goods, and if not, the consumer must return the subject of the credit agreement to the credit provider. The request to sell the subject of the agreement or its return to the credit provider forms part of the requirements to get the surrender process started. The notice to the credit provider in terms of section 127(1)(a) to terminate the credit agreement must be in writing, and an oral notice of termination by the consumer therefore has no effect, and could be ignored by the credit provider.

²⁹ S 127(1)(b)(ii), discussed in par 2.2 below.

³⁰ The only exception is discussed in par 2.8 below.

³¹ S127(1).

³² An example may be where the credit provider has “repossessed” goods that were left by the consumer in the possession of a third party, eg, a panel beater, from the latter.

The scope of application of section 127 is clearly limited to three types of credit agreements in terms of the NCA, an instalment agreement, secured loan and a lease.³³ All the aforementioned agreements fall within one of the main categories of credit agreements subject to the Act, the credit transaction.³⁴

In order to form an understanding of the types of credit transactions subject to section 127, it is apt to consider their respective definitions in section 1 of the Act. The instalment agreement³⁵ is a contract of sale of movable property, in terms of which the purchase price, either in its entirety or in part, is deferred and to be paid on a periodic basis. Although payment is deferred, the possession and use of the property is transferred to the consumer-buyer immediately. However, depending on the terms of the contract, ownership in the goods either passes to the consumer upon the fulfilment of the obligations under the agreement³⁶ or immediately, subject to the right of the credit provider to repossess the property in the event that the consumer defaults under the credit agreement, by failing to satisfy all his financial obligations under the agreement.³⁷ In terms of the definition of the instalment agreement, interest, fees or charges must be payable by the consumer to the credit provider in terms of the agreement, alternatively on the deferred amount. Interest serves as the *quid pro quo* payable in respect of deferral of payment.

The lease agreement³⁸ entails an agreement in terms of which the possession of movable property is transferred to the consumer, alternatively the use of the property is provided to the consumer at the direction of the latter. The payment for the use of

³³ Otto and Renke in Scholtz (ed) par 9.5.4.1. See also Otto “The surrender of goods in terms of the National Credit Act” 2015 *THRHR* 492 and Van Heerden 2018 *THRHR* 243

³⁴ S 8(4) lists eight different types of credit transactions. The other main categories of credit agreements subject to the NCA are the credit facility and credit guarantee, defined in s 8(3) and (5) respectively. See Otto and Renke in Scholtz (ed) ch 8 and Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) par 2.4 for a discussion of the credit agreements subject to the Act.

³⁵ For a complete discussion of the instalment agreement, see Otto and Renke in Scholtz (ed) par 8.2.3.4 and Renke and Pillay “The National Credit Act 34 of 2005: The passing of ownership of the thing sold in terms of an instalment agreement” 2008 *THRHR* 641.

³⁶ The consumer will thus, in terms of the agreement, only become the owner of the goods upon the payment of the final instalment in terms of the contract. Such a clause in an instalment agreement is known as an “ownership reservation” clause, because the credit provider retains ownership in the goods until the final instalment has been paid by the consumer. The ownership reservation clause in the contract serves as security in favour of the credit provider, to ensure the payment of the latter’s money in terms of the agreement. This renders this credit agreement popular in practice as a contract of sale of more expensive consumer goods, such as vehicles.

³⁷ According to Renke and Pillay 2008 *THRHR* 6 this transfer of ownership option is seldomly used in practice.

³⁸ For a complete discussion of the lease agreement in terms of the NCA, see Otto and Renke in Scholtz (ed) par 8.2.3.7, and the sources referred to in the footnotes.

the leased goods is deferred and interest, fees or other charges are payable by the consumer in respect of the agreement or deferred amount. Although an ordinary common law lease of movable goods thus seems to be pertinent, the legislature requires in the definition of the lease that at the end of the agreement, ownership of the asset will pass to the consumer “absolutely” or upon having met a condition stipulated in the agreement, which makes the lease in the National Credit Act an atypical lease. It is obvious that the definitions of the instalment agreement and lease overlap. In both cases movable goods are concerned which are possessed and used by the consumer immediately, and upon the expiry of the contract the consumer becomes the owner of the goods. It is important to note that “rental agreements” in terms whereof goods (for instance photo copy machines) are bought and then leased to the consumer, but subject to the condition that the goods must be returned to the credit provider (lessor) at the expiry of the contract, are not subject to the NCA.³⁹

The last type of agreement to which section 127 applies is the secured loan.⁴⁰ In terms of the definition in the Act, this is an agreement⁴¹ in terms of which credit is granted or money is advanced to another. In exchange, the credit provider retains movable property or any other thing of value, alternatively receives a pledge to movable property, as security for the payment of the consumer’s obligations under the agreement. Examples of secured loans are the registration of a special notarial bond⁴² or the cession of a personal right⁴³ to secure the payment of the consumer’s obligations under a credit agreement. In summary in respect of the credit transactions subject to the section 127 surrender right: two of the transactions involve the sale or lease of movable goods, in terms whereof the consumer eventually becomes the owner of the goods. In the case of the secured loan credit or money is advanced to the consumer, for instance against the registration of a special notarial bond over the consumer’s movable property. I find it difficult to see similarities between the instalment and lease agreements on the one hand and the secured loan on the other. The question is whether the legislature should have included the secured loan in section 127, or should not have brought more credit agreements subject to the Act

³⁹ See *Absa Technology Finance Solutions Ltd v Michael’s Bid a House* CC 2013 (3) SA 426 (SCA) and *Otto* 2015 *THRHR* 491.

⁴⁰ See *Otto* and *Renke* in *Scholtz* (ed) par 8.2.3.6.

⁴¹ Excluding an instalment agreement.

⁴² *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) par 60. For more information on notarial bonds, see *Nagel et al* 431-432.

⁴³ *Otto* and *Renke* in *Scholtz* (ed) par 8.2.3.6.

within its ambit. The latter part of the aforementioned question in particular is relevant, seeing that section 127, in line with section 3 of the NCA, is aimed at the protection of credit consumers.

2.3 Section 127(2)

Section 127(2) of the Act provides as follows:

(2) Within 10 business days after the later of —

- (a) receiving a notice in terms of subsection (1)(b)(i); or
- (b) receiving goods tendered in terms of subsection (1)(b)(ii), a credit provider must give the consumer written notice setting out the estimated value of the goods and any other prescribed information.⁴⁴

The provisions of section 127(2) follow from section 127(1) and impose an obligation on the credit provider. The latter is triggered by the consumer's notice to terminate the particular credit agreement or return of the goods to the credit provider, whichever occurs later in time. The credit provider is required to furnish written notice to the consumer containing information pertaining to the estimated value of the goods that have been surrendered, or that were already in the credit provider's possession.⁴⁵ The purposes of the "section 127(2) notice" are closely linked to the provisions of sections 127(3) and (4) discussed below and the subsequent sale of the goods, if at all, and will thus be discussed under the sub-paragraphs to follow. In order to obtain an estimated value of the goods to enable the credit provider to comply with the provisions of section 127(2), the credit provider will have to task an expert in respect of the type of goods (for instance a second-hand car or furniture dealer) to put a value on the goods.

2.4 Section 127(3)

Section 127(3) is important in the context of section 127 and must be read with subsections 127(2) and (4) of the Act to form an understanding of the importance of the section 127(2) notice, the consumer's options and the credit provider's obligations in terms of these subsections. Section 127(3) stipulates as follows:

- (3) Within 10 business days after receiving a notice under subsection (2), the consumer may unconditionally withdraw the notice to terminate the agreement in terms of subsection (1)(a), and

⁴⁴ It has already been noted that no regulations have been promulgated in respect of s 127.

⁴⁵ Otto and Renke in Scholtz (ed) 9.5.4.3.

resume possession of any goods that are in the credit provider's possession, *unless*⁴⁶ the consumer is in default under the credit agreement.

Section 127(3) distinguishes two types of consumers who decide to surrender their goods in terms of section 127, a consumer who is not in default and one that is in default when surrendering occurs.⁴⁷ The latter probably decided to surrender as a result of default, the inability to pay his instalments, and to avoid debt enforcement⁴⁸ in court by the credit provider. It has to be remembered that in terms of section 130(1)(c)⁴⁹ debt enforcement is not an option if the consumer has already surrendered the property forming the subject of the credit agreement to the credit provider. The consumer who surrenders but is not in default may surrender because he is “experiencing, or likely to experience, difficulty satisfying”⁵⁰ his obligations in terms of his credit agreement/s. This consumer, who is not in default yet, wants to avoid going into default. However, the consumer who is not in default when surrendering the goods may be perfectly capable of servicing his credit agreement debt, but surrenders, for instance, to get rid of his existing credit agreement to enable him to buy a more recent model car.

Section 127(3) is clear that only the aforementioned consumer who is not in default when section 127 is made use of, upon the receipt of the section 127(2) notice with the estimated value of the goods, may exercise the option to withdraw the notice in terms of section 127(1) to terminate the credit agreement, and request the credit provider to return the goods to him in order to continue with the credit agreement and the payment of instalments.⁵¹ The consumer who is in default upon surrender is excluded from the latter option by the words “unless the consumer is in default under the credit agreement”. “Unless” is the operative word and, as will be seen in the next sub-paragraph, is repeated in section 127(4). It is submitted that the credit provider does not have the option to provide the consumer in default with the possession of the goods, in order for him to continue with the credit agreement. Even if a credit provider had the aforementioned option, it would probably not make use of it, for the simple reason that the consumer is in default and is therefore (probably) unable to satisfy his

⁴⁶ My emphasis.

⁴⁷ Van Heerden 2018 *THRHR* 246. See also Otto 2015 *THRHR* 492.

⁴⁸ In terms of Ch 6 Part C of the Act. See also Otto 2015 *THRHR* 492.

⁴⁹ See par 1.1 above.

⁵⁰ See s 86(7)(b). S 86 concerns applications for debt review by a consumer who is allegedly over-indebted.

⁵¹ Van Heerden 2018 *THRHR* 246. See also Coetzee 2010 *THRHR* 574.

obligations in terms of the agreement. The latter renders the return of the goods to the consumer impractical, which is probably the reason why this group of consumers, once they have surrendered the goods, are excluded from the option to withdraw the notice of termination and have the goods returned to them.

Section 127(3) thus introduces a measure in respect of which the consumer who is not in default may “re-instate” the credit agreement despite having surrendered the goods to the credit provider.⁵² This consumer is to be placed in a position they were in had the surrender of goods not occurred.⁵³ The requirements enabling the non-defaulting consumer to exercise his rights in terms of section 127(2) are accordingly twofold: the section 127(2) notice with the value of the goods must have been furnished to the consumer and the consumer must not have been in default under the credit agreement when the goods were surrendered.⁵⁴ The question arises as to the relevance of the section 127(2) notice. This notice will be an indication to the consumer whether there will be a shortfall in respect of the credit agreement if a sale of the goods subsequently takes place, which may influence the consumer who is not in default not to continue with the surrender process, but rather to continue with the credit agreement.

Thus, if the provisions of section 127(3) are considered, the relevant purpose of the section 127(2) notice is enabling the non-defaulting consumer to make an informed decision regarding the continuation with the surrender of goods process, in particular in the case of an indication of a probable shortfall subsequent to the goods being sold by the credit provider.⁵⁵

2.5 Section 127(4)

Section 127(4) of the Act provides as follows:

(4) If the consumer-

(a) responds to a notice as contemplated in subsection (3), the credit provider must return the goods to the consumer *unless*⁵⁶ the consumer is in default under the credit agreement; or

(b) 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.

⁵² Van Heerden 2018 *THRHR* 248.

⁵³ Otto 2015 *THRHR* 492.

⁵⁴ Coetzee 2010 *THRHR* 573.

⁵⁵ Otto 2015 *THRHR* 492.

⁵⁶ Emphasis added.

Section 127(4), similarly to section 127(3), distinguishes the consumer who is in default, or not, upon surrender of the goods.⁵⁷ Even if the former responds in terms of section 127(3) and wants to withdraw the notice of termination of the credit agreement, the credit provider, who does not have the option to return the goods to the consumer, must sell the goods. This is once again indicated by the words in section 127(4) “unless the consumer is in default under the credit agreement”. The latter of the aforementioned consumers, who is in good standing with the payment of his credit agreement obligations, may react to the section 127(2) notice by requesting the credit provider (in terms of section 127(3)) to return the goods to him, in which case the credit provider is compelled to oblige. However, if this consumer does not respond upon the receipt of the section 127(2) notice, the credit provider must sell the goods “as soon as practicable for the best price reasonably obtainable”. The latter obligation of the credit provider to sell the goods in terms of section 127(4), and the proviso that is imposed in section 127(4) in respect of the time of the sale and the price as aforementioned, divulges further purposes (to the abovementioned) of the section 127(2) notice. It ensures that the credit provider does not sell the goods below their value or worth,⁵⁸ and enables the consumer to refer to the notice should a dispute regarding the sale arise between the consumer and the credit provider that is subsequently referred to the Tribunal in terms of section 128. The effect of not furnishing the consumer with the notice in terms of section 127(2) nullifies the sale of the goods that occurs.⁵⁹ After the sale of the goods has taken place, a mere accounting and offsetting process follows.

2.6 Section 127(5)

Section 127(5) of the National Credit Act provides for another important notice by the credit provider, the “section 127(5) notice”. This notice, which must be sent by the credit provider to the consumer, has received the attention of the courts,⁶⁰ similarly to the section 127(2) notice discussed above.⁶¹ Section 127(5) of the Act provides the following:

⁵⁷ Otto 2015 *THRHR* 492. See also Van Heerden 2018 *THRHR* 248.

⁵⁸ Van Heerden 2018 *THRHR* 257.

⁵⁹ Van Heerden 2018 *THRHR* 257.

⁶⁰ See par 3.3 below on the duty vested in the credit provider in respect of the manner of delivery of the notice to the consumer.

⁶¹ Pars 2.3-2.5.

- (5) After selling any goods in terms of this section, a credit provider must -
- (a) 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; and
 - (b) give the consumer a written notice stating the following:
 - (i) the settlement value⁶² of the agreement immediately before the sale;
 - (ii) the gross amount realised on the sale;
 - (iii) the net proceeds of the sale after deducting the credit provider's permitted default charges, if applicable, and reasonable costs allowed under paragraph (a); and
 - (iv) the amount credited or debited to the consumer's account.

This subsection (and the others to follow) outlines the process to be followed by a credit provider pursuant to the sale of the goods. It has already been mentioned in the previous sub-paragraph that a calculation and offsetting process is pertinent, in which the proceeds obtained in terms of the sale plays a pivotal role.⁶³ The consumer's account with the credit provider must either be debited⁶⁴ or credited with the proceeds of the sale, less expenses that have been incurred by the credit provider to sell the goods.⁶⁵ After the sale the credit provider must also furnish the consumer with a notice in writing containing information in respect of the consumer's account as well as the sale of the goods. The section 127(5) notice is required to reflect (a) the settlement amount of the credit agreement prior to the sale; (b) the gross amount for which the goods were sold; (c) the net proceeds of the sale, which is the gross proceeds minus the credit provider's "permitted default charges"⁶⁶ minus reasonable costs to have the goods sold; and (d) the amount the consumer's account has been debited or credited with.⁶⁷ The purpose of this notice is clearly to keep the consumer informed of the sale and of the state of affairs of his account with the credit provider. The section 127(5)(b) notice also enables the consumer to compare the gross proceeds of the sale with the

⁶² "Settlement value" is defined in s 1 as the amount to be paid by the consumer to satisfy all the latter's financial obligations to the credit provider payable on a particular date, calculated in accordance with s 125(2). Therefore, it includes the outstanding amount of the principal debt and unpaid interest, fees and other charges on that date.

⁶³ Par 2.4 above.

⁶⁴ The consumer's account would probably be debited in the unlikely event that the cost of the sale exceeds its proceeds.

⁶⁵ Eg, the costs of an auction. See also Otto and Renke in Scholtz (ed) par 9.5.4.4.

⁶⁶ Although s 127(5)(b)(iii) refers to "default charges", s 1 refers to "default administration charge", which is "a charge that may be imposed by a credit provider to cover administration costs incurred as a result of a consumer defaulting on an obligation under a credit agreement".

⁶⁷ S127(5)(b)(i)-(iv) respectively. See also Otto and Renke in Scholtz (ed) par 9.5.4.4.

estimated value of the goods in terms of the section 127(2) notice.⁶⁸ If there is a big discrepancy between these amounts in the sense that the former is far less than the latter, the deduction may be made that the credit provider probably did not sell the goods “for the best price reasonably obtainable”, in which case the consumer may rely on the provisions of section 128 to dispute the sale.⁶⁹ It will be seen in the next subparagraph that the section 127(5) notice may also be used by the credit provider to claim a shortfall after the sale, if any, from the consumer. The importance of the section 127(2) and (5) notices raises questions regarding the method of delivery thereof and whether they must come to the consumer’s attention in order to be effective, which are addressed in the next chapter. For now, it suffices to say that the method of delivery of notices in terms of section 127 is not provided for in section 127 itself. The remainder of the subsections of section 127 (section 127(6)-(10)) are discussed below, without quoting them.

2.7 Section 127(6) to (9)

Section 127(6)(a) pertains to circumstances where the goods that were surrendered in terms of section 127 also form the subject of a credit agreement with another credit provider, and where after the sale of the goods, the consumer’s account is credited with an amount which exceeds the settlement value of the account immediately before the sale (i.e. there is a surplus). The credit provider to whom the goods were surrendered and who was responsible for the sale thereof, must remit the surplus amount to the Tribunal, which may make an order in respect of the distribution of the amount to the different credit providers involved. If only the credit provider to whom the goods were surrendered has a credit agreement with the consumer, the credit provider must pay the surplus amount to the consumer with the section 127(5) notice, in which case the consumer’s credit agreement is terminated.⁷⁰

In what follows section 127(7) is discussed, followed by section 127(8)(b) and (a) and section 127(9). In the case of a shortfall after the sale of the goods⁷¹ the credit provider, when issuing the section 127(5) notice to the consumer, may demand payment of the

⁶⁸ Discussed in pars 2.3-2.5 above.

⁶⁹ See par 2.10 below. See also Otto 2015 *THRHR* 495.

⁷⁰ S 127(6)(b). See also Otto and Renke in Scholtz (ed) par 9.5.4.4.

⁷¹ Either the amount which is credited to the consumer’s account is less than the settlement value in terms of the account immediately before the sale, or the consumer’s account is debited. The latter was explained in par 2.6 above.

shortfall⁷² from the consumer.⁷³ If the consumer pays the amount demanded, the credit agreement is terminated. However, the consumer must pay the remaining settlement value under the credit agreement “at any time before judgment is obtained” by the credit provider, where it is necessary for the latter to enforce the payment of the shortfall in court.⁷⁴

Where a consumer fails to pay the shortfall on a voluntary basis after receipt of the section 127(7) notice, section 127(8)(a) empowers the credit provider to institute debt enforcement proceedings in terms of the Magistrates’ Courts Act⁷⁵ to enforce the payment of the shortfall by means of a court-judgment.⁷⁶ It seems proceedings in court may only be instituted if the consumer failed to react to the section 127(7) notice and a subsequent demand notice by the credit provider to pay the shortfall was sent to the consumer, but the provisions of section 127(8)(a) are not clear in this respect. Although not stated in section 127, it is assumed that once the consumer has paid the remaining settlement value under his credit agreement at any time before judgment is granted by the Magistrate’s Court, the credit agreement is terminated.

Irrespective of whether section 127(8)(a) or (b) is pertinent, in terms of section 127(9) the consumer is liable for the payment of interest to the credit provider on the amount demanded by the credit provider in terms of section 127(7), at the interest rate applicable to their credit agreement, and calculated from the date of the demand until the date of payment by the consumer.

2.8 Section 127(10)

The National Credit Act, unlike its predecessors, the Usury Act⁷⁷ and Credit Agreements Act,⁷⁸ does not contain “an all-encompassing penal provision”.⁷⁹ That means that a contravention of the Act does not constitute an offence, unless a particular section in the Act provides that a contravention of that section, or part in the

⁷² The remaining settlement value.

⁷³ S 127(7).

⁷⁴ S 127(8)(b).

⁷⁵ Act 32 of 1944.

⁷⁶ See also s 130(2)(a) and (b), which reiterates that a credit provider may approach a court to enforce the payment of the consumer’s remaining obligations under an instalment agreement, lease or secured loan after the sale if there is a shortfall (“the net proceeds of sale were insufficient to discharge all the consumer’s financial obligations under the agreement). This will naturally only happen if the consumer does not pay the remainder of his obligations as demanded in terms of s 127(7).

⁷⁷ 73 of 1968.

⁷⁸ 75 of 1980.

⁷⁹ Van Zyl in Scholtz (ed) par 16.1.

Act, is an offence. The latter is true in respect of section 127. Section 127(10) provides that “[a] credit provider who acts in a manner contrary to this section is guilty of an offence”, which is an indication of the serious light in which the legislature regards compliance (or non-compliance) with section 127 by credit providers. The aim is obviously to enforce compliance with this “extraordinary right” of consumers. In addition, the legislature wanted to ensure that consumers are aware of their section 127 right. Regulation 31(2)(y) of the Regulations to the National Credit Act⁸⁰ requires a credit provider to include a clause in credit agreements subject to section 127 that draws the consumer’s attention to the right, also containing a description of the process as described above.

2.9 Section 128

The relevance of section 128, titled “Compensation for consumer”, has already been mentioned.⁸¹ If there is a disputed sale between the consumer and the credit provider, because the credit provider did not sell the goods after their surrender “as soon as practicable” or “for the best price reasonably obtainable”⁸², the consumer must first attempt to resolve the matter directly with the credit provider. The consumer may also opt for alternative dispute resolution under Part A of Chapter 7⁸³ of the National Credit Act.⁸⁴ If these options proved to be unsuccessful, the Tribunal may be approached to “review the sale”.⁸⁵ If the NCT is satisfied that the credit provider did not sell the goods as aforementioned, the Tribunal is empowered in terms of section 128(2) to order the credit provider to credit and pay an extra amount to the consumer, exceeding the net proceeds of the sale. Any decision by the NCT in terms of section 128 is subject to appeal to, or review by, the High Court.⁸⁶

2.10 Consumer protection in terms of section 127 read with section 128

My preceding sub-paragraphs entailed a discussion of a credit consumer’s “extraordinary” cancellation right in terms of section 127, which must be read with

⁸⁰ Regulations to the National Credit Act published in GN R489 in GG 28864 of 31 May 2006 as amended.

⁸¹ See pars 1.1, 2.1 and 2.5 above. See also Otto 2015 *THRHR* 495 and Otto and Renke in Scholtz (ed) par 9.5.4.5.

⁸² S 127(4)(b) discussed in par 2.5 above. See s 128(2), discussed below, which makes the meaning of “disputed sale” clear.

⁸³ S 134. In terms of s 135, dispute resolution may result in a consent order by a court or the NCT.

⁸⁴ S 128(1).

⁸⁵ S 128(1).

⁸⁶ To the extent permitted by s 148. See s 128(3).

section 128 of the National Credit Act. The answer to the question whether these sections, in line with the NCA's objectives afford protection to credit consumers, is obvious. In 2007, the Act introduced a right that never existed in terms of our consumer credit legislation before. This right, which is restricted in respect of the type of credit agreements falling in its ambit, empowers the consumer to not only cancel the credit agreement unilaterally, but to also get rid of the goods forming the subject of that agreement by merely surrendering them to the particular credit provider. The credit provider is then saddled with the responsibility of the sale of the goods to a third party, after which a mere calculation and offsetting process follows. These in itself are benefits. However, the availability of the section 127 right to two groups of consumers, those who are in default, or are not in default, is one of its big advantages. The consumer in default can use cancellation and surrender to avoid the institution of legal action, and the accompanying debt enforcement costs, against him by the credit provider. The fact that this consumer, once he has surrendered the goods, cannot request that the goods be returned to him for the resumption of his credit agreement, makes sense. The consumer in default in any event cannot afford his credit agreement obligations, which renders the return of the goods to him and the continuation with his credit agreement impracticable.

The consumer who is not in default may surrender the goods for various reasons. One of these is to avoid contractual default or over-indebtedness, when this consumer experiences difficulty in servicing his credit agreement obligations. However, surrender may also take place for a totally different reason than struggling with debt payment, for instance merely to enable the buying of a more recent model car. Be that as it may, section 127 without doubt contributes to the achievement of the NCA's aim to protect credit consumers by the avoidance of over-indebtedness or contractual default.

The section 127 right holds other benefits or advantages as well. The first is that the consumer upon surrender does not have to pay the full contract price to the credit provider himself. The proceeds of the sale of the goods is taken into consideration in the latter respect. If the sale is disputed, section 128 creates a redress mechanism for the consumer. The second is that the consumer, for whatever reason he surrenders the goods, gets rid of an interest- and cost- bearing debt.

2.11 Preliminary remarks

The stated purpose of this chapter was to outline the section 127 surrender process in terms of the National Credit Act, with the aim to ascertain whether the section, read with section 128, affords sufficient consumer protection, in particular in light of the sub-goals in section 3 to avoid consumer over-indebtedness and contractual default. As far as this aim is concerned, substantive versus procedural protection must be distinguished. In the latter respect the importance of the section 127(2) and (5) notices has been indicated, and the legislature's failure to provide for the manner of delivery of these notices to the consumer and whether they must actually come to the latter's attention in order to be effective. In my next chapter selected court decisions addressing the legislature's aforementioned failure and other issues surrounding section 127 will be considered.

CHAPTER 3

CASE LAW IN RESPECT OF SECTION 127 OF THE NATIONAL CREDIT ACT

3.1 Introduction

The section 127 process, introduced in the National Credit Act and discussed in my previous chapter, has been the subject of judicial interpretation since it became effective on 1 June 2007. This is in particular true for the section 127(2) and (5) notices, which respectively informs the consumer of the estimated value of the goods after their surrender⁸⁷ and of the settlement value of the agreement before the sale, gross and net proceeds of the sale and amount debited or credited to his account.⁸⁸ I have pointed to the fact that the legislature failed to address in the Act the method of delivery of these notices and whether they should be brought to the consumer's attention in order to be effective. In what follows below, selected court decisions in respect of section 127, and the section 127(2) and (5) notices in particular, will be discussed.

3.2 Section 127(1)

Section 127(1) of the National Credit Act⁸⁹ sets the surrender of goods process in motion and requires a written notice to the credit provider to terminate the credit agreement and the surrender of the goods to the credit provider, unless the latter is already in possession of the goods. The interesting case of *MFC (A Division of Nedbank Ltd) v Botha*⁹⁰ is pertinent. The applicant bank (MFC) bought a vehicle in terms of a credit agreement (instalment sale) from a motor dealership at the instance of the respondent (Botha) with the express intention to sell it to the latter, and thus MFC assumed the role of credit provider, and not supplier of the goods. Because of the latter, the agreement between MFC and Botha expressly excludes any warranty by MFC in respect of the goods. Botha subsequently returned the vehicle to MFC, because he allegedly became dissatisfied with its condition. MFC wished to deal with the matter in terms of section 127 of the National Credit Act. Botha in turn contested the application of section 127 of the NCA to the facts and relied on section 56(2) of

⁸⁷ Par 2.3 above.

⁸⁸ Par 2.6 above.

⁸⁹ Discussed in par 2.2 above.

⁹⁰ [2013] ZAWCHC 107 (15 August 2013), hereafter "*Botha*".

the Consumer Protection Act⁹¹ for relief.⁹² The Court in *Botha*⁹³ remarked that MFC misguidedly treated the surrender of the vehicle as one in accordance with the provisions of section 127 of the NCA. Section 127 “provides for a regulated basis for a credit provider to recover contractual damages upon the statutorily permitted voluntary termination of a credit agreement by a consumer”. Importantly, the Court further remarked⁹⁴ that “[t]he consumer is able to effect such a voluntary termination *by giving notice in terms of s 127(1)(a) of the NCA*”.⁹⁵ *Botha*’s failure to give notice to MFC in terms of section 127(1)(a) upon the surrender of the vehicle to the latter consequently renders the further sub-provisions of section 127 inapplicable.⁹⁶ *Botha* thus confirms that a mere surrender of goods in terms of section 127(1)(b) is not sufficient to put the section 127 process in operation, but that to effect the latter the surrender must be accompanied by a notice by the consumer to the credit provider in terms of section 127(1)(a) to terminate the credit agreement.⁹⁷

3.3 Section 127(2), (5) and (7)

The section 127(2) notice, informing the consumer of the estimated value of the goods after its surrender, is of crucial importance in the context of the section 127 process, and has several purposes.⁹⁸ However, section 127(2)(b) merely provides that “a credit provider must give the consumer written notice” of the aforementioned value, and does not address the method of delivery of the notice or whether it should come to the consumer’s attention in order to be effective. Before considering selected case law dealing with the latter issues, background information and context must be provided.

⁹¹ 68 of 2008, the “CPA”. S 56(2) concerns the return of defective goods to the supplier thereof in which case the latter must repair or replace the goods or refund the consumer.

⁹² *Botha* pars 1-3.

⁹³ Par 11.

⁹⁴ *Botha* par 11.

⁹⁵ Emphasis added.

⁹⁶ Par 12.

⁹⁷ For a discussion of *Botha* and in particular the interrelationship between s 127 of the NCA and s 56(2) of the CPA, see Otto, Van Heerden and Barnard “Redress in terms of the National Credit Act and Consumer Protection Act for defective goods sold and financed in terms of an instalment agreement” 2014 *SA Merc LJ* 247-281. The writers contend that it is essential to differentiate between the situation where a consumer return the goods because they are defective or where he voluntarily surrenders the property in the circumstances contemplated in s 127 of the NCA. The latter would naturally be governed by the NCA and the former by the CPA.

⁹⁸ S 127(2) is discussed in par 2.3 above. However, for more purposes of the s 127(2) notice, it must be considered in conjunction with s 127(3) and (4), which is discussed in pars 2.4 and 2.5 above respectively.

Reference has already been made to section 129 of the National Credit Act, which concerns “Required procedures before debt enforcement”.⁹⁹ Section 129(1)(a) in particular concerns a notice by a credit provider to a consumer who is in default to draw the default to the consumer’s notice in writing. However, section 129(1)(a), similarly to section 127(2) (and 127(5), discussed below), does not provide how the notice must be brought to the consumer’s attention. However, section 130(1)(a), which must be read with section 129(1)(a), provides that the notice must be “delivered”, a concept which is not defined in the NCA. This gave rise to many court decisions and eventually two Constitutional Court (“CC”) cases, *Sebola v Standard Bank of South Africa Ltd*¹⁰⁰ and *Kubyana v Standard Bank of South Africa Ltd*.¹⁰¹ These cases in turn gave rise to an amendment of section 129 of the National Credit Act in terms of the National Credit Amendment Act 14 of 2019, by the insertion of subsections 129(5) to (7), providing how the section 129(1)(a) notice must be delivered to the consumer and what constitutes proof of delivery.¹⁰²

In *Sebola*, in which a section 129(1)(a) notice was sent to the consumer per registered post, the notice was dispatched to the incorrect post office.¹⁰³ In terms of the majority judgment section 129(1)(a) must be read with section 130(1)(a).¹⁰⁴ The meaning of “delivered” in terms of the latter, with reference to sections 65,¹⁰⁵ 96¹⁰⁶ and 168¹⁰⁷ of the Act, is that despatch of the section 129(1)(a) notice “must at the very least” be done via registered mail.¹⁰⁸ However, registered mail on its own is not sufficient. The credit provider must also make allegations that satisfy the enforcement court that on a balance of probabilities the section 129(1)(a) notice reached the consumer.¹⁰⁹ Proof must be provided by the credit provider that the section 129(1)(a) notice was indeed

⁹⁹ Par 1.1.

¹⁰⁰ 2012 (5) SA 142 (CC), hereafter “*Sebola*”.

¹⁰¹ 2014 (3) SA 56 (CC), hereafter “*Kubyana*”.

¹⁰² In terms of s 129(5), delivery in person to an adult person and registered mail are now provided for in the NCA as the methods of delivery of the s 129(1)(a) notice. For detail, see Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) par 12.4.4.

¹⁰³ *Sebola* par 5.

¹⁰⁴ *Sebola* pars 52-59. In pars 55-56 the CC explained that s 129(1)(a) sets out the “what” must be done by the credit provider (draw the default to the notice of the consumer in writing) and s 130(1)(a) the “how” it must be done (by means of delivery in terms of the Act).

¹⁰⁵ S 65(2) in particular provides how a document in terms of the Act must be delivered if no method for delivery has been prescribed in terms of the National Credit Regulations and *inter alia* provides for delivery per ordinary, but not registered, mail.

¹⁰⁶ S 96 entails the “Address for notice”.

¹⁰⁷ S 168 provides for “Serving [of] documents”.

¹⁰⁸ *Sebola* par 68.

¹⁰⁹ *Sebola* par 74.

delivered to the correct post office. For this purpose, a track and trace print-out from the post office is required.¹¹⁰ The majority judgment in *Sebola* was not clear, gave rise to divergent interpretations by the High Courts, and eventually another decision by the CC in *Kubyana*. In this case, although the section 129(1)(a) notice was sent to the correct branch of the post office the consumer, who was notified twice to collect the registered post item, failed to do so. The consumer relied on *Sebola* and alleged that the section 129(1)(a) notice was not properly delivered and did not come to the consumer's notice.¹¹¹ The CC importantly held that the NCA neither requires that the section 129(1)(a) notice comes to the consumer's subjective attention nor that it be delivered in person to the consumer in order to be effective. The notice must be made available to the consumer as per the wording of section 65(2).¹¹² An acceptable method of making the notice available to the consumer in terms of section 65(2) is via the postal service. However, if the consumer chose delivery of the notice via post, the credit provider must incur the extra expense and cause the notice to be delivered via registered post. It must also be ensured that the notice is dispatched to the correct branch of the post office.¹¹³ What is expected of a credit provider in order to cause the delivery to be effective are those steps that are required to bring the section 129(1)(a) notice to the attention of a *reasonable*¹¹⁴ consumer.

Now returning to the case law on the section 127(2) notice: the purposes of the notice and the method of its delivery will be investigated in accordance with *Firstrand Bank Ltd t/a Wesbank v Baliso*,¹¹⁵ *Baliso v Firstrand Bank Ltd t/a Wesbank*,¹¹⁶ *Edwards v Firstrand Bank Ltd t/a Wesbank*,¹¹⁷ and, more recently, *Nedbank Ltd (MFC Division) v Silinda*.¹¹⁸ In all these cases a surrender of goods which formed the subject of an instalment agreement in terms of the National Credit Act was pertinent.

In *Baliso a quo* the plaintiff (Wesbank) alleged in the particulars of claim that a section 127(2)(b) notice was sent to the defendant (Baliso). However, in reliance on the majority judgment in *Sebola*, Baliso pleaded that Wesbank did not comply with section

¹¹⁰ *Sebola* pars 75-76.

¹¹¹ *Kubyana* par 11.

¹¹² *Kubyana* par 31.

¹¹³ *Kubyana* par 32.

¹¹⁴ Emphasis added.

¹¹⁵ [2015] ZAWCHC 146 (21 January 2015), hereafter "*Baliso a quo*".

¹¹⁶ 2016 (10) BCLR 1253 (CC), "*Baliso CC*".

¹¹⁷ [2016] ZASCA 144 (30 September 2016), "*Edwards*".

¹¹⁸ [2020] ZAGPJHC 314 (4 September 2020), *Silinda*.

127(2)(b), because the notice was sent via ordinary mail and not registered mail.¹¹⁹ This reason (and the fact that Baliso did not receive the section 127(2)(b) notice) was also used in an exception to Wesbank’s particulars of claim, in that Wesbank allegedly failed to comply with the guidelines that were laid down in *Sebola* and *Kubyana*.¹²⁰ Baliso requested the court to uphold the exception and to dismiss Wesbank’s action. Alternatively, the Court was requested to adjourn the matter and to make an appropriate order in terms of section 130(4)(b).¹²¹ The Court therefore had to interpret the provisions of section 127(2)(b) and its requirements and address the question whether the *Sebola* guidelines also find application in the case of the section 127(2)(b) notice.¹²² The Court in *Baliso a quo* subsequently discussed the wording and purposes of section 129(1)(a) versus that of section 127(2)(b) in accordance with *Sebola* and remarked that in terms of section 129(1)(a) (read with sections 129(1)(b) and 130(1)) the credit provider must draw the default to the consumer’s notice, and that the notice must be “delivered” to the consumer. The Court also referred to the above-mentioned remarks in *Sebola* that the despatch of the section 129(1)(a) notice must “at the very least” be effected via registered mail and that the credit provider’s averments must satisfy the enforcement court on a balance of probabilities that the notice reached the consumer.¹²³ Section 127(2)(b), in contrast, neither requires that anything must be drawn to the consumer’s notice nor that anything must be delivered to the latter.¹²⁴ Although section 65 does not take the matter any further, it does provide for the delivery of documents via ordinary mail.¹²⁵ The court next pointed to the “significant difference” between the two notices under discussion. Section 127 pertains to a voluntary surrender of goods and, consequently, it would be expected that this consumer in the normal course of events would realise that the goods will be probably resold. Thus, the consumer “is in a position to look after his or her own interest and to enquire about the estimated value [of the goods surrendered]”.¹²⁶ The court then made the remark that “it is not necessary for a credit provider to allege in the summons that

¹¹⁹ *Baliso a quo* pars 2-3.

¹²⁰ *Baliso a quo* pars 5 and 10.

¹²¹ *Baliso a quo* par 5. S 130(4)(b) must be read with s 130(3)(a), which provides that a court may only determine a matter if “(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with”. See in this regard *Baliso a quo* par 19.

¹²² *Baliso a quo* par 10.

¹²³ *Baliso a quo* par 13.

¹²⁴ *Baliso a quo* par 14.

¹²⁵ *Baliso a quo* par 15.

¹²⁶ *Baliso a quo* par 16.

a section 127(2) notice was delivered by registered mail subject to the requirements spelt out in the *Sebola* judgment”,¹²⁷ and held that notice in terms of section 127(2) by ordinary mail was sufficient, Wesbank therefore complied with the NCA’s provisions and postponement of the matter in terms of section 130(4) was unnecessary.¹²⁸ The court found for Wesbank and dismissed Baliso’s exception and prayer that Wesbank’s action be dismissed.¹²⁹ Leave to appeal was refused.¹³⁰

Baliso consequently applied for leave to appeal the Western Cape Division of the High Court’s decision to the CC. Baliso contended that the court in *Baliso a quo* erred when dismissing his exception to Wesbank’s particulars of claim and refusing to order the stay of the matter.¹³¹ Although the majority decision¹³² by the CC declined leave to appeal to that Court,¹³³ Froneman J made important remarks in the context of section 127. In respect of jurisdiction: the purpose of compliance with the section 127 notices (the CC presumably also referred to the section 127(5)(b) notice) is a prerequisite to determine the matter in terms of section 130(3)(a), and the meaning of the word “determine” hinges on the fact whether the matter before a court is unopposed or opposed.¹³⁴ In *Sebola* the former was the case and in *Kubyana* (and *Baliso a quo*) the latter.¹³⁵ Baliso argued before the CC that it does not make sense to distinguish between the manner of giving notice under sections 129(1) and 127(2), despite the fact that these notices serve different purposes. He submitted that a credit provider’s failure to comply with section 127(2) holds more severe consequences for the consumer than a failure to comply with section 129(1)(a), an argument in respect of which Froneman J significantly remarked “[t]here is much force in this”.¹³⁶

¹²⁷ *Baliso a quo* par 17.

¹²⁸ *Baliso a quo* par 20.

¹²⁹ *Baliso a quo* par 21.

¹³⁰ *Baliso CC* par 3.

¹³¹ *Baliso CC* pars 3, 4 and 9.

¹³² Froneman J delivered this decision, with which six judges concurred.

¹³³ For the majority’s full reasons for the refusal of the Appeal, and their consideration of *Sebola* and *Kubyana*, see *Baliso CC* pars 4-36.

¹³⁴ *Baliso CC* par 11.

¹³⁵ *Baliso CC* pars 13-16 and 19.

¹³⁶ *Baliso CC* par 22.

After referring to the dilatory¹³⁷ consequences of the section 129(1)(a) notice,¹³⁸ Froneman J remarked that the section 127(2) notice has the same dilatory consequences, but also “a more serious effect as well”. This latter notice follows upon the written termination of the credit agreement by the consumer and the surrender of the goods to the credit provider. The credit provider must subsequently give the written section 127(2)(b) notice to the consumer “setting out the estimated value of the goods and any other prescribed information”, which in effect “gives the consumer a choice, a second bite at the cherry as it were”. The consumer may resume the possession of the goods, provided he is not in default in terms of the credit agreement. However, if the consumer chooses not to respond to the section 127(2)(b) notice, the credit provider must sell the surrendered goods, where after a realisation process takes place.¹³⁹ Against this background: the section 127(2)(b) notice provides the consumer with “vital information” whether the sale of the goods will be to his benefit or not (in other words whether there will be a surplus or a shortfall after the sale). Lack of proper notice deprives the consumer of the opportunity to make a proper choice whether to withdraw his termination of the credit agreement.¹⁴⁰

However, failure by the credit provider as aforementioned acts to its detriment as well. The provisions of section 127 in respect of the sale of the goods become inoperative and the credit provider will not be successful in claiming a shortfall, if any. The credit provider runs the risk of forfeiting his claim for the repayment of any outstanding money and the consumer may not only have dilatory, but substantive grounds to resist any claim of the credit provider for outstanding money.¹⁴¹ In the light of these serious consequences of a failure to comply with the section 127(2)(b) notice, “the submission that there exists no good reason to differentiate materially between the method of complying with the section 127(2) notice requirement and that under section 129(1)(a)”, has merit.¹⁴² Baliso contended that in the context section 127(2) requires “actual proof of receipt” of the notice by the consumer. However, in respect of the

¹³⁷ According to facilegis.co.za/special-pleas/ [accessed on 9 January 2022] a special plea does not raise a defence on the merits of a case. If it is a dilatory plea, a special defence is raised and its objective is to delay the proceedings.

¹³⁸ According to Froneman J this notice serves to ensure that the consumer is afforded the opportunity, by means of extrajudicial processes, to pay his outstanding debt. Non-compliance with these processes merely results in the court process being postponed until they are followed. *Baliso CC* par 23.

¹³⁹ *Baliso CC* pars 25-26.

¹⁴⁰ *Baliso CC* par 27.

¹⁴¹ *Baliso CC* par 27.

¹⁴² *Baliso CC* par 27.

section 129(1)(a) notice *Sebola* and *Kubyana* confirmed that “proof that the notice would probably have come to the attention of a reasonable consumer is required”.¹⁴³ Froneman J next referred to the section 127(3) context, which provides that “after receiving a notice under subsection (2)”, the consumer has the option to unilaterally withdraw his notice of termination of the agreement (and to resume the possession of the goods). Importantly, the CC held that “the purpose of making [him] aware of the choice of withdrawal would also be achieved if the notice and its content come to [his] attention without actual receipt”. Furthermore, “[a]dapted to the purpose of section 127, what is required before a court may determine the matter is proof that the section 127(2) notice was actually received by, or came to the attention of, a reasonable consumer”. *Kubyana* explained the qualification of “reasonable, which is also required in respect of the section 127(2) notice, namely to prevent the consumer to frustrate compliance with section 127.¹⁴⁴

The minority judgment¹⁴⁵ (by Zondo J, with three judges concurring), referring to Baliso’s unconstested affidavit in the court *a quo* which accompanied his exception to Wesbank’s particulars of claim, eventually reached a totally different decision to the majority’s. According to Zondo J the question to be decided in this matter is whether the sending of a section 127(2) notice by means of ordinary mail constitutes compliance with the provisions of section 127, which is an important question of law not been considered by the CC before. It is decision of interest to the credit market and both the credit provider and consumer would like to know whether the sending of the notice per ordinary mail will suffice.¹⁴⁶ The decision is appealable as it relates to the jurisdiction or competence of the High Court to determine the matter. It is consequently in the interest of justice that leave to appeal should be granted. Due to the fact that the vehicle in question has already been sold by Wesbank, a conclusion by the CC that section 127(2) was not complied with by Wesbank, will be fatal to the latter’s main action.¹⁴⁷ Zondo J subsequently focussed on the second part of Baliso’s objection to Wesbank’s claim, that the High Court did not have jurisdiction to determine the matter because Wesbank did not comply with section 127(2),¹⁴⁸ and then on the

¹⁴³ *Baliso* CC par 28.

¹⁴⁴ *Baliso* CC par 29.

¹⁴⁵ *Baliso* CC pars 38-80.

¹⁴⁶ *Baliso* CC par 45.

¹⁴⁷ *Baliso* CC par 46.

¹⁴⁸ *Baliso* CC pars 47-49.

effect of the court *a quo*'s decision that the sending of the notice per ordinary mail was sufficient to constitute compliance.¹⁴⁹ For the latter purpose the provisions of sections 127 and 130(3) and (4) must be considered. With reference to the introductory sentence to section 130(3), Zondo J remarked that “only if the court is satisfied that” (and what follows in the sub-subsections of section 130(3)) is a jurisdictional fact for a court to “determine the matter” before it.¹⁵⁰ If an exception is in respect of the jurisdiction of a court and is dismissed, the decision is final and appealable.¹⁵¹

In answering the question whether there was compliance by Wesbank with the provisions of section 127(2)(b), Zondo J agreed that there is merit in Baliso's contention (and the majority's decision) “that the manner in which section 127(2) must be complied with need not be different from the manner in which section 129 must be complied with”,¹⁵² and concurred with the reasons provided by Froneman J. After that Zondo J referred to *Sebola's* and *Kubyana's* decisions that despatch of the section 127(2) notice, when conducted by mail, must be done per registered mail.¹⁵³

Zondo J next expressed the view that “the sending of a section 127(2) notice by ordinary mail... does not constitute compliance with section 127(2)”.¹⁵⁴ The High Court in *Baliso a quo* could not conclude compliance with section 127(2) and therefore erred. The only allegation in Wesbank's particulars of claim was that the section 127(2) notice was sent to Baliso, but it was not indicated how the notice was sent.¹⁵⁵ The High Court should have upheld Baliso's exception and dismissed Wesbank's claim. The goods cannot be sold if there is non-compliance with section 127(2) and because the goods have already been sold, section 130(4) does not find application. There is nothing Wesbank can do to salvage the matter.¹⁵⁶

The next case, *Edwards*, considered section 127(2) and section 127(5)(b) of the National Credit Act. The latter notice, once again, concerns the notice by the credit provider to the consumer after the sale of the surrendered goods, in terms whereof the credit provider informs the consumer of the settlement value of the agreement

¹⁴⁹ *Baliso CC* pars 50-79.

¹⁵⁰ *Baliso CC* par 58.

¹⁵¹ *Baliso CC* par 71.

¹⁵² *Baliso CC* par 72.

¹⁵³ *Baliso CC* pars 73-74.

¹⁵⁴ *Baliso CC* par 75.

¹⁵⁵ *Baliso CC* pars 76 and 79.

¹⁵⁶ *Baliso CC* par 79.

immediately before the sale, the gross and net amounts¹⁵⁷ of the sale and the amount debited or credited to the consumer's account.¹⁵⁸ The *Edwards*-decision by the Supreme Court of Appeal ("SCA")¹⁵⁹ is the law due to the fact that the CC in *Baliso CC* neither decided the sending of the section 127(2) notice per ordinary mail as a question of law nor considered the despatch of the section 127(5)(b) notice.¹⁶⁰ According to Monama J in the court *a quo* the only defence of the appellant (*Edwards*) to be considered was whether the respondent (*Wesbank*) had complied with the provisions of section 127(2) and (5) of the NCA, which were also the issues to be decided by the SCA.¹⁶¹ *Edwards* also contended that the vehicle in question was not sold for the "best price reasonably obtainable in terms of section 127(4)(b), but abandoned this contention.¹⁶²

According to *Edwards* he did not receive the section 127(2) and (5) notices, but *Wesbank* contended that was to be ascribed to the fact that *Edwards* provided a physical address for delivery where he knew no street delivery took place. The latter was confirmed by the court *a quo*, who found that *Edwards* acted unreasonably in this regard.¹⁶³ Shongwe JA next referred to *Kubyana* paragraph 46 (that the NCA does not imply that a consumer may act unreasonable and, in that case, ignored the consequences of her choice to receive notices via registered post), *Sebola* paragraph 11, where section 129(1)(a) was the issue and not section 127, and Froneman J's majority decision in *Baliso CC*, where the latter referred with approval to Jafta's remark in *Kubyana*¹⁶⁴ that the facts serving before a particular court will determine whether adequate proof of delivery was constituted and that the determination on the facts must be left to that court. Thus, it is not prudent to lay down a general principle, "save to say that a credit provider must place before the court facts which show that the notice, on a balance of probabilities, has reached the consumer".¹⁶⁵

¹⁵⁷ The gross amount of the sale less the credit provider's reasonable expenses in respect of the sale of the goods and its permitted default charges.

¹⁵⁸ See the discussion in par 2.6 above.

¹⁵⁹ For the decision by Shongwe JA (with which three judges concurred), see *Edwards* pars 1-18. Cachalia JA read Shongwe JA's judgment and agreed with the order he proposed. However, Cachalia JA (with one judge concurring) was of the opinion that "the disputed issues require fuller treatment". See in the latter regard pars 19-58.

¹⁶⁰ See the remarks by the SCA below that Froneman J's decision was *obiter*.

¹⁶¹ *Edwards* pars 7 and 8.

¹⁶² *Edwards* pars 8 and 34.

¹⁶³ *Edwards* par 9.

¹⁶⁴ Par 98.

¹⁶⁵ *Edwards* par 10.

The next remark by Shongwe JA, that Froneman J's remark – that there is “much force” in Baliso's argument that it is illogical to distinguish the manner of giving notice under sections 127(2) and 129(1)(a) – was *obiter*, is important. According to Shongwe JA it is the SCA's understanding that the distinction was not relevant to the facts in *Baliso CC*, which was the reason for the CC not deciding the issue “definitively”.¹⁶⁶ Shongwe JA then cut to the chase, referred to Zondo J's point of view (in paragraph 30 of the minority decision in *Baliso CC* that the issue is whether sending the section 127(2) notice by ordinary post constitutes compliance with section 127(2)) and remarked that the credit provider's failure to comply with the provisions of section 127(2) is detrimental to the credit provider as well, because it cannot pursue the recovery of any shortfall after the sale of the surrendered goods. Although it may be advisable, the law does not require the sending of the section 127(2) notice by registered mail. The law is clear that section 127(2) must be interpreted in accordance with its plain grammatical meaning, and registered mail is not what the legislature intended when it used the words “give the consumer written notice”.¹⁶⁷

Turning to the section 127(5)(b) notice, Shongwe JA remarked that although the notice was sent to Edwards, the reason for it allegedly not reaching him rests on his shoulders. Shongwe JA subsequently discussed the application of section 127(2) to (9) in the case of a forced repossession which falls outside the ambit of my dissertation, and made an order dismissing Edward's appeal.¹⁶⁸

I now turn to a few important remarks by Cachalia JA. The latter, with reference to Edward's contention that Wesbank due to its failure to dispatch the relevant notices in terms of section 127(2) and (5) by registered mail did not comply with these subsections, remarked that Edwards “sought to take refuge in the procedural protections afforded to debtors by the National Credit Act”.¹⁶⁹ After providing the full background to the case and considering the relevant provisions (sections 127(2) to (5), 128, 129 and 131), Cachalia JA remarked that the credit provider's estimated value of the goods “plays no part” pertaining to the question whether the goods were sold in terms of section 127(4)¹⁷⁰ “for the best price reasonably obtainable”. This is

¹⁶⁶ *Edwards* par 11.

¹⁶⁷ *Edwards* par 11.

¹⁶⁸ *Edwards* pars 13-18.

¹⁶⁹ *Edwards* par 23. In par 55 alleged non-delivery of the s 127(5) and (7) notices is referred to “as a procedural shield to avoid meeting [Edward's] contractual obligations”.

¹⁷⁰ See par 2.5 above.

illustrated by the fact that *in casu* the car was sold for substantially more than the estimated value provided to Edwards.¹⁷¹ Cachalia JA stated the “clear purpose” of the section 127(2) notice is to enable the consumer to decide whether to withdraw the notice of termination of the credit agreement in terms of section 127(1) and to resume the possession of the goods, an option that was not available to Edwards. Due to the forced repossession of the car, section 127(2) did not apply to Edwards.¹⁷² However, even if section 127(2) did apply:

“once it was proved that the notice was sent to Mr Edwards, he had to explain why it was not reasonable to have expected the notice to reach his attention. This is because he bore the burden of rebutting the inference of delivery, and to show that his conduct was reasonable.”

Cachalia JA subsequently made the following significant remarks:¹⁷³

“[Edward’s] insistence on the notice having to be sent by registered mail is to resort to form over substance. The question, surely, is whether or not he had actually received the notice or rebutted the inference that he had, not whether it was sent to him by registered mail.”

Cachalia JA found that Edwards is deemed to have received the section 127(2) notice¹⁷⁴ and next considered the section 127(5)(b) notice. With reference to a consumer whose goods have been attached, which was the case *in casu*, Cachalia JA stated the purpose of this notice is to put the consumer in a position to consider whether the credit provider “has accounted properly in respect of the matters covered in s 127(5)(b)(i)-(iv)”. This purpose of the notice must be true in respect of a voluntary surrender as well.

If the sale is in dispute (regarding the price obtained for the goods) and cannot be resolved by the consumer, the latter may rely on the provisions of section 128 and approach the Tribunal to review the sale.¹⁷⁵ Edward’s defence that he did not receive the section 127(5)(b) notice was rejected by the SCA.¹⁷⁶ Cachalia JA stated that it is “important” to emphasise the CC’s remark¹⁷⁷ concerning the purpose of complying with notices, such as those in section 127, namely as a prerequisite to determine the matter, and that when a matter is being determined, depends on whether it is an unopposed (default judgment) or opposed matter, where evidence is heard.¹⁷⁸ In the

¹⁷¹ *Edwards* par 43.

¹⁷² *Edwards* par 43.

¹⁷³ *Edwards* par 44.

¹⁷⁴ *Edwards* par 48.

¹⁷⁵ *Edwards* par 50.

¹⁷⁶ *Edwards* pars 51-52.

¹⁷⁷ In *Baliso CC* par 11.

¹⁷⁸ *Edwards* par 53.

case of the former, which is not applicable in Edward's case, "different considerations apply to the procedural protections of consumers".¹⁷⁹ Edwards could have disputed the price obtained via the sale of the vehicle (and any other section 127(5)(b) matter) and used the provisions of section 128 before the trial commenced. However, he waited until the trial to do that.¹⁸⁰ Cachalia JA held that there was no substance in Edward's complaint of non-delivery of the section 127 notices. However, even if there was, the purpose of the section 127(5) notice was to put Edwards in a position to contest Wesbank's calculations and the price obtained through the sale of the car.¹⁸¹ It has already been mentioned that Cachalia JA agreed with Shongwe JA's order.¹⁸²

Silinda, my final case to be discussed, is more recent. However, *Silinda* held by Nel AJ in the Gauteng Local Division of the High Court in Johannesburg, unsurprisingly referred to the CC-decision in *Baliso CC* and followed the *Edwards*-decision by the SCA. In order to avoid unnecessary repetition, in what follows only issues that were not addressed by the CC or SCA will be discussed.

First, brief background is provided: In *Silinda*, an opposed application, the respondent (Silinda) surrendered a vehicle that was bought in terms of an instalment agreement subject to the NCA to Nedbank (the applicant).¹⁸³ Nedbank sent a notice in terms of section 127(2) to Silinda, who stated that he did not receive the notice. Silinda neither replied to the notice nor exercised the rights conferred on him in the notice.¹⁸⁴ After that Nedbank sold the vehicle in access of the forced sale value and credited Silinda's account, on which there was a substantial shortfall.¹⁸⁵ Next, Nedbank sent a notice in terms of section 127(5) to Silinda, who once again stated that he did not receive the notice.¹⁸⁶

In reliance on *First Rand Bank Limited t/a Wesbank v Dave*¹⁸⁷ Silinda raised a point *in limine* that he did not receive a section 129(1)(a) notice in terms of the NCA,¹⁸⁸ which prohibited Nedbank from instituting legal proceedings to enforce payments in

¹⁷⁹ *Edwards* par 54.

¹⁸⁰ *Edwards* par 54.

¹⁸¹ *Edwards* pars 55 and 56.

¹⁸² See *Edwards* par 58.

¹⁸³ *Silinda* pars 1-7.

¹⁸⁴ *Silinda* pars 24 and 26.

¹⁸⁵ *Silinda* pars 27-28.

¹⁸⁶ *Silinda* pars 29-30.

¹⁸⁷ [2019] ZASCA 168 (29 November 2019), hereafter "*Dave*", par 6. See *Silinda* pars 74-75.

¹⁸⁸ *Silinda* pars 67 and 70.

terms of the instalment agreement and precluded him from entering into settlement negotiations with Nedbank.¹⁸⁹ However, the counsel for Nedbank submitted that section 129(1)(a) does not apply in the case of a surrender of goods in terms of section 127. It was also submitted that *Davel* is distinguishable from *Silinda*, in that in *Davel* section 131, and not section 127, applied.¹⁹⁰ The counsel for Nedbank finally submitted that section 127, in subsection (7), contains its own demand procedure for any balance owing, and that Nedbank complied with the provisions of section 127.¹⁹¹ Nel AJ held that *Davel* must be distinguished from *Silinda*,¹⁹² where legal proceedings arise from the provisions of section 127, a section 129(1)(a) notice in terms of the Act is not required, because section 127 itself regulates the procedure to be followed by the credit provider to enforce the payment of any outstanding amount,¹⁹³ and dismissed Silinda's point *in limine*.¹⁹⁴

Next, in respect of the despatch of the section 127(2) and (5) notices, Nel AJ referred to *Edwards* which held that it is not required by law for these notices to be sent by registered mail.¹⁹⁵ However, Nel AJ then stated that although *Edwards* "may be good authority for the submission that notices in terms of Section 127(2) and (5) of the NCA do not ordinarily need to be sent by registered mail", Nedbank cannot ignore the terms of its own instalment agreement in terms whereof registered mail will be used for the delivery of legal notices to Silinda.¹⁹⁶ According to Nel AJ the established legal principles by the courts in respect of registered mail thus applied to Silinda, and had to be considered by the court.¹⁹⁷

Nel AJ subsequently, before finding whether the applicant complied with section 127, addressed the purpose of the notice provisions in the NCA. Although Nel AJ concurred with *Edwards* in respect of the purposes of the section 127(2) notice (to enable the consumer to cancel the termination of the credit agreement and to resume the possession of the surrendered goods, and to enable the credit provider to sell the

¹⁸⁹ *Silinda* pars 71 and 73.

¹⁹⁰ *Silinda* pars 79-80.

¹⁹¹ *Silinda* pars 82-83.

¹⁹² *Silinda* pars 86-94. According to Nel AJ the voluntary surrender of a vehicle in terms of s 127 must be distinguished from a repossession thereof. See *Silinda* par 89.

¹⁹³ *Silinda* pars 97-98.

¹⁹⁴ *Silinda* par 99.

¹⁹⁵ *Silinda* pars 139-140.

¹⁹⁶ *Silinda* pars 141-142.

¹⁹⁷ *Silinda* par 144. Nel AJ consequently considered the cases mentioned and discussed above as well as *Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans (Formerly First Rand Bank of South Africa Ltd)* [2010] ZASCA; 2010 (6) SA 439 (SCA) (30 September 2010). See *Silinda* pars 145-177.

goods in terms of section 127(4)¹⁹⁸), he in contrast to Cachalia JA stated that the notice's purpose is also to enable the consumer, with regard to the valuation amount, to consider the effect of the sale of the goods on the credit agreement.¹⁹⁹ Nel AJ reiterated the purpose of the section 127(5)(b) notice as per *Edwards*²⁰⁰ and said in respect of the section 127(7) demand notice that this notice is "clearly a precursor to any legal proceedings being commenced [in terms of section 127(8)²⁰¹ to claim the remaining settlement value in terms of the credit agreement]".²⁰² However, the credit provider is also entitled to demand the payment of the remaining settlement value in the section 127(5)(b) notice.²⁰³

Nel AJ found as follows in respect of the respective section 127 notices: in *Silinda's* case and because of the latter's default, the section 127(2) notice was not required;²⁰⁴ Nedbank failed to prove that a section 127(5)(b) notice was sent to *Silinda*;²⁰⁵ and on a balance of probabilities *Silinda* received a demand notice as required in terms of section 127(8).²⁰⁶ Nel AJ consequently held that Nedbank did not comply with the provisions of section 127 and postponed the matter in terms of section 130(4) to afford Nedbank the opportunity to comply with section 127(5) and (7).²⁰⁷

3.4 Preliminary remarks

The purpose of this chapter was to discuss selected court decisions in respect of the provisions of section 127, and case law in respect of section 127(1), (2), (5) and (7) was considered. It was established that a mere surrender of the goods by the consumer to the credit provider is not sufficient to set the section 127 process in motion. In addition, the consumer must provide the credit provider with a written notice in terms whereof the credit agreement is cancelled.²⁰⁸ My research further established that the failure by the legislature to provide the method of delivery of the respective

¹⁹⁸ Discussed in par 2.5 above. See *Silinda* par 194.

¹⁹⁹ *Silinda* par 208.

²⁰⁰ *Silinda* par 220.

²⁰¹ Discussed in par 2.7 above.

²⁰² See also *Silinda* par 194, where receipt of the s 127(7) demand notice is required to commence legal proceedings in terms of s 127(8).

²⁰³ *Silinda* par 226.

²⁰⁴ *Silinda* par 213.

²⁰⁵ *Silinda* par 225.

²⁰⁶ *Silinda* par 235.

²⁰⁷ *Silinda* par 240.

²⁰⁸ Par 3.2 above.

section 127 notices in terms of the National Credit Act is a major lacuna,²⁰⁹ an aspect which will be addressed in my final chapter, which follows.

²⁰⁹ Par 3.3 above

CHAPTER 4: CONCLUSIONS AND FINAL REMARKS

The National Credit Act is legislation that was undoubtedly promulgated to provide protection to consumers that are active in the credit market. The introduction in the NCA of the credit consumer's extraordinary right in terms of section 127 to cancel selected credit agreements and to rid himself of the goods forming the subject of the credit agreement, with its accompanying benefits, accordingly must be welcomed. The section 127 surrender process constitutes a mechanism to legitimately repudiate the credit contract, without having to suffer the common law consequences, with build-in procedural protections.²¹⁰ However, the process is balanced and, in accordance with the provisions of section 3, promotes equity in respect of the rights and obligations of both parties to the credit agreement. There can be no doubt that section 127 is consumer orientated and was promulgated with the latter's rights and protection in mind. However, from the credit provider's perspective no harm is suffered, except for the loss of interest, due to the contract not running its full course. The credit provider is for instance entitled to its expenses reasonably incurred in connection with the sale of the goods,²¹¹ the shortfall, should it arise, with the implication that the credit provider acquires the full contract price which was due to it in terms of the agreement at the end of the process.

The aforementioned extraordinary right of the consumer as consumer protection measure speaks for itself. In addition, the consumer is put in a position to rid himself of a credit agreement, with its implied interest and other costs. Although the credit provider is entitled to the "remaining settlement value"²¹² in terms of the agreement on the date of surrender, and thus to the full amount of the principal debt,²¹³ the consumer does not have to pay the full outstanding amount of the principal debt himself, due to the proceeds of the sale of the goods. The advantages of the surrender process for both a consumer who is in default and one who is not, have already been discussed.²¹⁴ It will suffice to reiterate the alleviation of consumers' over-indebtedness and the prevention of contractual default, in accordance with the ultimate aim of the

²¹⁰ Par 1.1. See also the remarks by Cachalia JA in *Edwards* (par 3.3) in respect of the consumer's s 127 "procedural protections" or "procedural shield".

²¹¹ See par 2.6.

²¹² See par 2.6 for the meaning of "settlement value".

²¹³ The "principal debt" is the deferred amount in terms of the credit agreement on which interest is calculated. See "principal debt" in s 1. See also s 101(1)(a) and reg 39(1).

²¹⁴ See par 2.11.

dissertation²¹⁵ and the main and sub-aims of the NCA in section 3.²¹⁶ The consumer's "procedural protections" or "procedural shield" in section 127 are obvious.²¹⁷ The same holds for the *lacunae* in section 127 in this respect, but this will be addressed further below.

The credit provider is also afforded protection in section 127 in that it for instance is entitled to the reasonable expenses incurred in respect of the sale of the goods. The credit provider also receives the full amount of the principal debt in terms of the credit agreement and interest and other fees and charges due and payable up to the date of surrender. However, the latter forfeits interest and other costs, but it must be remembered that the Act protects the consumer.

Now turning to the *lacunae* in section 127, the failure by the legislature to provide for the method to be used by the credit provider to bring the section 127 notices to the consumer's attention and to give clarity whether the notices should actually be received by the consumer to be effective.²¹⁸ In respect of the latter issue: I think the case law²¹⁹ is clear in this respect. It can never be expected of a credit provider to provide proof that a notice was actually received by a consumer. However, the credit provider must present the court with sufficient evidence to justify an inference of delivery, which must subsequently be rebutted by the consumer, showing to the court that his conduct was reasonable.²²⁰

The former issue, the method of bringing a section 127 notice to the consumer's attention is settled, at least for now. The SCA in *Edwards* held that registered mail²²¹ is not required by the law. Credit providers should nevertheless be cautious of the provisions in its contracts with consumers. If the credit agreement stipulates that the consumer has selected registered mail as the method of delivery of legal notices to him, the section 127 notices must be dispatched via registered mail (which includes the *Sebola* requirements).²²² In the light of the CC's remarks in *Baliso CC*, credit

²¹⁵ See pars 1.2 and 1.3.

²¹⁶ See in the latter respect par 1.1.

²¹⁷ Eg, the different notices in terms of s 127(2), (5) and (7), their respective purposes and consequences if the credit provider fails to comply with the s 127 provisions (eg the sale provisions are inoperative or the payment of the shortfall cannot be enforced), as confirmed by the courts, and s 128, permitting the consumer to dispute the sale of the goods. See pars 2.3-2.7, 2.9 and 3.3.

²¹⁸ Van Heerden 2018 *THRHR* 260.

²¹⁹ In particular *Kubyana* and *Edwards*.

²²⁰ Par 3.3.

²²¹ With the accompanying requirements as per *Sebola*.

²²² See *Silinda* in par 3.3.

providers will also be well-advised to rather incur the costs to “at least” have their section 127 notices delivered per registered mail.²²³

However, similarly to *Sebola* in respect of the section 129(1)(a) notice and in spite of the clear grammatical words used in section 127, the SCA could have put the matter to bed by at least requiring despatch per registered mail. Although *Edwards* may be correct when considering the clear grammatical wording used in section 127, ordinary mail as a manner to dispatch section 127 notices is not sufficient. The legislature could also have used the opportunity it had in the NCA Amendment Act 19 of 2014 or 7 of 2019 to address the section 127 delivery issues raised by the courts.²²⁴

²²³ See par 3.3.

²²⁴ Par 3.3.

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