UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

Aspects of debt enforcement in terms of the National Credit Act 34 of 2005 and its predecessors compared

by

Prescious Ndlelehle Mogale

17205493

Submitted in partial fulfilment of the requirements for the degree:

Master's degree

Mercantile Law

at the University of Pretoria

Prepared under the supervision of: Prof Stefan Renke

2022

SUMMARY

The current consumer credit enactment effective in South Africa, the National Credit Act 34 of 2005 ("NCA"), contains provisions to protect consumers who are in default in terms of a credit agreement in respect of the enforcement of its debt by the credit provider. The same held for the NCA's predecessors, the Hire-Purchase Act 36 of 1942 and the Credit Agreements Act 75 of 1980. The aim of this dissertation is to compare the NCA's debt enforcement provisions with those of its predecessors, with particular focus on the debt enforcement notice required in terms of the respective Acts, the method of delivery of the notice, and the requirement of the notice having been received by the consumer in order to be effective. The ultimate aim is to determine whether the debt enforcement provisions of the NCA can be improved, having regard to the provisions in its predecessors and cases decided in respect of the latter.

Table of Contents

CHAPTER 1

GENERAL INTRODUCTION

1.1 Introduction

Credit is a necessary commodity in the daily lives of many South African consumers. As at March 2022, the number of credit consumers active in the credit market was 26.48 million.[1] Of the 26.48 million credit-active consumers, 16.44 million were classified as being in good standing, while 10.04 million were considered to have impaired credit records.[2]

The Department of Trade Industry and Competition has acknowledged this by stating that credit presents an array of opportunities, ranging from economic to educational, including an improvement of "standard of living".[3] However, in light of the opportunities presented by credit and the fact that credit is extended to consumers in terms of credit agreements, Otto and Otto submit that "it is also a fact of life that people commit breach".[4] Therefore, it is imperative that consumers are protected from creditors in instances where they commit a breach of the credit agreement. This was one of the reasons behind the enactment of consumer protection legislation.

South Africa has a long history of consumer protection legislation. Relevant to the topic of this dissertation are the Hire-Purchase Act,[5] the Credit Agreements Act,[6] the Alienation of Land Act,[7] and National Credit Act.[8] The Hire-Purchase Act preceded the Credit Agreements Act,[9] which was, in turn, repealed and replaced by the NCA.[10] The Hire-Purchase Act and the Credit

---

[1] Quarterly statistics provided by the National Credit Regulator available at https://www.ncr.org.za. [Accessed on 11 November 2022].
[2] Quarterly statistics provided by the National Credit Regulator available at https://www.ncr.org.za. [Accessed on 11 November 2022].
[3] Department of Trade and Industry South Africa *Consumer credit law reform: Policy Framework for consumer credit* 2004 6 ("Policy Framework").
[4] Otto and Otto "Dispute settlement and debt enforcement" in Otto and Otto (eds) *The National Credit Act Explained* (2015) (Otto and Otto *The NCA Explained* dispute settlement) par 4.4.
[5] Act 36 of 1942 ("Hire-Purchase Act").
[6] Act 75 of 1980 ("Credit Agreements Act").
[7] Act 68 of 1981 ("ALA"). The ALA, which became effective on 19 October 1982, regulates contracts for the purchase of land on instalments. The Alienation of Land Act was preceded by the Sale of Land on Instalments Act 72 of 1971 ("Sale of Land Act"). See Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005*, thesis submitted for the degree Doctor Legum UP (2012) ("Renke thesis") 327 and Otto and Renke "Introduction and historical background to the National Credit Act" in Scholtz (ed) *Guide to the National Credit Act* (2008) ("Otto and Renke *Guide* introduction") par 1.3.4.
[8] Act 34 of 2005 ("NCA").
[9] Otto and Renke *Guide* introduction par 1.3.3.
[10] S 172(4)(b) of the NCA.

Agreements Act regulated "contractual aspects of instalment contracts relating to movable goods".[11] The NCA has a similar aim. However, the NCA, which, in contrast to its predecessors, also applies to credit agreements in respect of immovable property,[12] such as mortgage agreements, and regulates the contractual and the financial aspects of the agreements to which it applies.

The NCA, similarly to its predecessors, contains specific provisions to protect credit consumers in respect of debt enforcement of a credit agreement debt by the credit provider.[13] The same holds for the Alienation of Land Act. Requiring a notice by the credit provider to the consumer of default and providing the consumer an opportunity to rectify the default before the institution of debt enforcement proceedings are common features of the consumer-protection provisions in all the aforementioned Acts. However, the prescriptions in respect of these notices, for instance, the notice periods, form of breach of contract involved, and delivery of the notice, differ between the Acts. The delivery of the debt enforcement notice and whether the notice must reach the consumer in order to be effective have been contentious issues in respect of each piece of legislation.

The form of breach of contract committed most frequently by credit consumers is failure by the debtor (*mora debitoris*)[14] — the consumer either stops paying credit instalments, or does not pay the full instalment, and thus falls in arrears in terms of the credit agreement.

It must be noted that a particular credit agreement has to be subject to a particular credit enactment in order for the debt enforcement provisions of that Act to apply to, and thus protect, the consumer involved. The opposite is also true: with reference to the National Credit Act, which is the consumer credit enactment currently effective in South Africa, if the NCA does not apply to a particular credit agreement, the same holds for the debt enforcement provisions in the Act. The consumer involved will therefore have to rely on, for instance, civil procedure law for protection with regard to receipt of a notice of demand before summons may be issued against the consumer.

[11] Renke thesis 327.
[12] The NCA and the ALA apply in conjunction in respect of immovable property transactions on credit.
[13] Ch 6 Part C, s 129(1)(a) and (b), read with s 130(1).
[14] Boraine and Renke "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part I)" 2007 *De Jure* 222.

1.2 Research statement

The aim of this dissertation is to investigate and compare the different debt enforcement notices in terms of the Hire-Purchase Act, the Credit Agreements Act, and the National Credit Act, with the main focus of the discussion being the delivery of the notice and whether the notice will only be effective if it has come to the consumer's attention. A further aim is to determine whether the NCA's provisions have successfully addressed and reformed any inefficiencies of its predecessors, and if any lessons could be learned from their provisions. The provisions of the ALA are discussed for similar reasons. The ultimate aim is to make recommendations, if necessary, in respect of the NCA's debt enforcement provisions. The research will be conducted with reference to the provisions of the particular Act, case law, and academic discourse.

1.3 Research objectives and corresponding chapters

With reference to the above-mentioned research statement, pertinent research objectives were formulated to delineate and restrict the scope of this study. These are as follows:

a. Chapter 1 provides a general introduction, the research statement, and the research objectives of the study, as well as delineations in order to refine and restrict the scope of the research. The definitions of key terms used throughout the dissertation are also provided.

b. Chapter 2 provides an exposition of the debt enforcement provisions in terms of the Hire-Purchase Act and the Credit Agreements Act, the NCA's predecessors, with the focus as indicated in the research statement.

c. Chapter 3 provides a discussion of the debt enforcement provisions in terms of the ALA and the NCA, the Acts currently effective in South Africa having as aim to protect credit consumers. The discussion in this chapter is also delineated as indicated in the research statement. The interplay between these Acts and their fields of application are briefly addressed.

d. Chapter 4 provides a comparison of the debt enforcement provisions of the NCA with those of its predecessors and the ALA. The aims of this comparison were mentioned in my research statement. The dissertation concludes with final remarks and recommendations, if any are deemed necessary.

1.4 Delineations

It was stated in the research statement that, although the dissertation concerns the protection of consumers in respect of debt enforcement, the focus of this study is the debt enforcement notice and, in particular, the delivery thereof, as well as whether a debt enforcement notice is only effective once it has reached the consumer. Any other debt enforcement provisions in the pertinent Acts, the common law principles in respect of debt enforcement, and the rules of civil procedure law will not be considered, unless they are important to provide context to certain principles entrenched in one or more of the Acts. As far as legislation dealing with the sale of land on instalments is concerned, the Sale of Land Act will not be addressed, and the provisions of the ALA will not be discussed extensively. I have already mentioned that the interplay between these Acts and their fields of application will be briefly addressed.

1.5 Reference techniques and terminology

The credit provider, which is usually a juristic person, will be referred to as 'it'. The terminology used in a particular enactment to refer to the debtor or creditor will be used in my dissertation. However, the definitions of "consumer" and "credit provider", the concepts used in the NCA and defined in section 1, are as follows:

"'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 grantor 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 pawn transactions;
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."

CHAPTER 2

DEBT ENFORCEMENT IN TERMS OF THE HIRE-PURCHASE ACT AND THE CREDIT AGREEMENTS ACT

2.1 Introduction

It was noted that the predecessors to the consumer credit enactment currently effective in South Africa, the NCA, provided protection to a consumer who was in default in terms of a credit agreement.[15] In terms of both the Hire-Purchase Act and the Credit Agreements Act, debt enforcement notices to the consumer were a prerequisite before legal action could be instituted against the latter. Each of these Acts contained its own prescriptions in respect of the debt enforcement notice. This chapter discusses the relevant provisions of each of the aforementioned Acts with reference to case law and academic publications.

2.2 Hire-Purchase Act

2.2.1 General

Consumer credit legislation in the South African credit industry reached a milestone with the hire-purchase contract[16] because, as noted by Otto, socio-economic needs in the South African common law were fulfilled by the hire-purchase contract.[17]

This subsequently led to the enactment of the Hire-Purchase Act, which became effective on 1 May 1942.[18] According to the long title of the Hire-Purchase Act, its main purpose and the reason for its development were "to make provision for the regulation of hire-purchase agreements and of instalment sales subject to resolutive conditions, and for matters incidental thereto".[19] According to Belcher, the original purpose of the Hire-Purchase Act was to protect poor persons against uninformed financial decisions and folly.[20] The decision of the court in *Denton v Haldon's Furnishers (Pty) Ltd*[21] extended the purpose of the Hire-Purchase Act by

[15] See par 1 1.
[16] Otto "The history of consumer credit legislation in South Africa" 2010 *Fundamina* 262.
[17] Otto 2010 *Fundamina* 262.
[18] Renke thesis 326.
[19] Long title of the Hire-Purchase Act.
[20] Belcher (ed) *Norman's purchase and sale in South Africa* (1972) 166. The court in *Smit and Venter v Fourie* 1946 WLD provided that the reason why poor consumers needed to be protected against their poor financial decisions and folly was because they were exploited by credit providers in the sense that they were sold goods at prices they could not afford. See also *National Motors v Fall* 1958 (2) SA 570 par 571, where the court shares the view of the court in *Smit and Venter v Fourie.*
[21] 1951 (1) SA 720 (T) ("*Denton*").

providing that its purpose was to protect a class of persons.[22] The court in *Grosvenor Motors (Cape) Ltd v Samson*,[23] in support of Belcher, provided that the purpose of the Act was to protect consumers against themselves.[24] Contrarily, Marais J, in *Sette v D.H. Saker (Pty) Ltd*,[25] provided that the "object of the Act is to protect purchasers of goods against unscrupulous hire-purchase dealers".[26] It is therefore evident that there was a difference of opinion regarding the purpose of the Hire-Purchase Act and who it was meant to protect. Be that as it may, the Hire-Purchase Act contained protection in respect of debt enforcement in section 12.

The Hire-Purchase Act applied to hire-purchase agreements entered into after the commencement of the Hire-Purchase Act and which related to corporeal movable goods.[27] A hire-purchase agreement was defined in section 1 of the Hire-Purchase Act as "any agreement whereby goods are sold subject to the condition that the ownership in such goods shall not pass merely by the transfer of possession of such goods..."[28] Further, the purchase price of the goods involved must not have exceeded R4 000.[29] Such purchase price was to be paid in two or more instalments after the goods had been transferred to the consumer.[30] However, the Hire-Purchase Act did not apply to agreements where the State was the seller.[31] This exemption was due to a statutory interpretation presumption that an enactment is not applicable to the State or its executive arm, including provincial councils and local authorities.[32]

The rapid growth of the hire-purchase industry led to an increased interest in the hire-purchase agreement.[33] This was due to the fact that the stigma attached to hire-purchase agreements disappeared.[34] However, with growth come challenges, and these included abuse and malpractices.[35] Credit providers were abusing their power mainly because the consumer was

---

[22] *Denton* par 725.
[23] 1956 (3) SA 169 (C).
[24] The court provided that the purpose of the Hire-purchase Act was "to protect consumers against their own improvidence and folly", which is an opinion shared by Belcher.
[25] 1957 (2) SA 87 (W).
[26] Finally, in *Bowmaker (C.A.) (Pvt) Ltd v Wood N.O* 1959 (1) SA 766, it was provided that "[t]he apparent object of the legislature in the provisions of the Federal Hire-purchase Act of 1956, which is similar to, but by no means the same as, the South African Act, was to penalise any unscrupulous seller who by the offer of unlimited credit tempted the purchaser to spend more that he could afford".
[27] S 2(1)(a) of the Hire-Purchase Act.
[28] S 1(1) of the Hire-Purchase Act.
[29] S 2(1)(a) of the Hire-Purchase Act. See also Belcher at 167, where it was stated that the Hire-Purchase Act originally applied to movable goods that did not exceed R1 000; however, the amount was increased to R 4000. See also Diemont, Marais and Aronstam *The law of hire-purchase in South Africa* (1978) 40.
[30] S 1(1) of the Hire-Purchase Act.
[31] S 2(1)(b) of the Hire-Purchase Act.
[32] Hahlo and Kahn *The South African legal system and its background* (1968) 204-206.
[33] Otto 2010 *Fundamina* 263.
[34] Campbell-Salmon *Hire-purchase and credit sales law and practice* (1962) xxxix
[35] Otto 2010 *Fundamina* 263.

placed in a much weaker position than the credit provider due to unequal bargaining power.[36] Credit providers used standard-form contracts, which were questionable in the sense that these were susceptible to misrepresentations and unsubstantiated promises, and they excluded common-law warranties.[37] Thus, there arose an urgent need to promulgate effective and adequate consumer protection legislation in order to protect consumers from unscrupulous credit providers.[38] The introduction of the Hire-Purchase Act provided relief to consumers because it limited sellers' rights and lessened the cancellation of contracts.[39] Section 12 of the Hire-Purchase Act is of particular importance in this regard.

2.2.2 Debt enforcement in terms of the Hire-Purchase Act

Section 12 of the Hire-Purchase Act, which provided for a debt enforcement notice, provided as follows before its amendment in 1965:

> "12. No seller shall, by reason of any failure on the part of the consumer to carry out any obligation under any agreement be entitled to enforce –
>
> > (a) any provision in the agreement for the acceleration of the payment of any instalment, unless an instalment or any part thereof which is not less than one-tenth of the purchase price, or two or more instalments or parts of instalments which together are not less one-twentieth of the purchase price, are due and unpaid; or
> >
> > (b) any provision in the agreement for the payment of any amount as damages or for any forfeiture or penalty, or for the acceleration of the payment of any instalment, unless he has made a written demand to the consumer to carry out the obligation in question within a period stated in such demand, not being less than ten days, and the consumer has failed to comply with such demand."

After the 1965 amendment,[40] section 12 provided as follows:

> "12. No seller shall, by reason of any failure on the part of the consumer to carry out any obligation under any agreement be entitled to enforce –
>
> > (a) any provision in the agreement for the acceleration of the payment of any instalment, unless an instalment or any part thereof which is not less than one-tenth of the purchase price, or two or more instalments or parts of instalments which together are not less one-twentieth of the purchase price, are due and unpaid; or
> >
> > (b) any provision in the agreement for the payment of any amount as damages, or for the acceleration of the payment of any installment, unless he has by letter handed over to the consumer or sent by registered post to him at his last known residential or business address, made demand to the consumer to carry out the obligation in question within a period stated in such demand, not being less than ten days, and the consumer has failed to comply with such demand."

[36] Otto 2010 *Fundamina* 263.
[37] Otto 2010 *Fundamina* 263.
[38] Otto 2010 *Fundamina* 264.
[39] Otto 2010 *Fundamina* 264.
[40] Hire-Purchase Amendment Act 30 of 1965 ("Hire-Purchase Amendment Act").

2.2.2.1 The section 12 debt enforcement notice

The wording of section 12(b), as amended, clearly indicated that the seller could not enforce a credit agreement in terms of the Hire-Purchase Act unless a notice of demand had been sent to the consumer.

Initially, section 12(b) of the Hire-Purchase Act provided that the seller was required to send a written demand, by registered post, to the buyer to notify the buyer of the default in terms of the hire-purchase agreement.[41] However, it was difficult for the seller to give the written demand to the buyer, especially in cases where the buyer's address had changed without the seller's knowledge.[42] As such, section 12 of the Hire-Purchase Act was amended. The amendment to section 12(b) of the Hire-Purchase Act changed the way in which the section was initially structured. The first part of section 12(b) remained unchanged. However, the manner in which the written demand was to be delivered to the consumer was extended. The amended section 12(b) was worded in such a way that the seller had a choice of either handing the letter of demand to the consumer or sending it by registered post.[43] Thus, under the amended section 12(b), the seller was required to provide proof of the fact that such demand had been dispatched to the buyer if sent by registered post, and such proof was sufficient to entitle the seller to institute summons.[44]

However, with regard to the delivery of the demand by registered post, the question was whether the demand had to have reached the consumer in order for there to be compliance with the provisions of section 12(b). A further question, with regard to section 12(b), was how the 10-day period was to be calculated.

In *Weinbren v Michaelides*,[45] the credit provider, in order to enforce a debt, sent a written letter of demand to the consumer's last known address by registered post; however, the letter did not reach the consumer.[46] Because the post office could not deliver the letter, it was returned to the credit provider marked "Gone away".[47] The hire-purchase agreement between the credit

[41] Govender and Kelly-Louw "Delivery of the compulsory section 129(1) notice as required by the National Credit Act of 2005" 2018 *PER/PELJ* 6.
[42] The Hire Purchase Amendment Act no 030 of 1965 (part II) Available at https://journals.co.za/doi/pdf/10.10520/AJA02500329_4144 [Accessed on 11 November 2022].
[43] Diemont, Marais and Aronstam 136. See also Diemont Aronstam *The law of credit agreements and hire-purchase in South Africa* (1982) 181.
[44] The Hire Purchase Amendment Act, no 030 of 1965 (part II). Available at https://journals.co.za/doi/pdf/10.10520/AJA02500329_4144 [Accessed on 11 November 2022].
[45] 1957 (2) All SA 100 (W) ("*Weinbren*").
[46] *Weinbren* pars 101-102.
[47] *Weinbren* par 102.

provider and consumer contained a clause that read "any written notice to be given to the consumer shall be sufficiently delivered if sent by post to the residential or business address of the consumer last known to the seller".[48] In other words, the seller and the consumer were in agreement that section 12(b), in its unamended form, would be complied with if the letter of demand was sent by registered post to the last address of the consumer known to the seller. The consumer subsequently argued that, by virtue of the wording of section 20 of the Hire Purchase Act, a consumer may not waive the right to receive a letter (notice) of demand, that the clause in the hire-purchase agreement was of no force or effect, and that section 12(b) had not been complied with.[49]

The court, relying on the wording of section 12(b), held that, in order for a written letter of demand to have force and effect, it was necessary that it reached the consumer.[50] The onus was thus on the seller to ensure that any letter of demand sent by registered post reached the consumer.[51] The court further held that the letter had to be in writing, and had to have reached the consumer and be complied with in 10 days.[52] The court also held that the wording of section 12(b) was clear; the consumer could not enter into a hire-purchase agreement outside of the scope of protection awarded by section 12(b).[53] Accordingly, the court held that, based on the wording of section 12(b), it was a requirement and a right that the consumer be personally made aware of the demand, in writing.[54]

Fitzgerald v Western Agencies[55] was an appeal case heard in 1967, after the amendment of section 12(b) of the Hire-Purchase Act. In this case, the credit provider claimed a balance due in terms of a hire-purchase agreement.[56] The consumer had failed to pay the instalments due to the credit provider on a specified due date.[57] In the summons, it was alleged that the credit provider had complied with the provisions of section 12(b).[58] The credit provider had sent a letter of demand by registered post to the consumer's last known residential address.[59] The post office could not deliver the letter, but instead returned it to the credit provider, because the

[48] *Weinbren* par 102.
[49] *Weinbren* par 102. See also s 20 of the Hire-Purchase Act.
[50] *Weinbren* par 102.
[51] *Weinbren* par 102.
[52] *Weinbren* par 102.
[53] *Weinbren* par 102.
[54] *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 (4) SA 994 (AD) ("*Maharaj*"). See also Diemont, Marais and Aronstam 137; Diemont and Aronstam 181.
[55] 1968 (1) All SA 366 (T) ("*Fitzgerald*").
[56] *Fitzgerald* par 367.
[57] *Fitzgerald* par 367.
[58] *Fitzgerald* par 367.
[59] *Fitzgerald* par 367.

consumer had moved without giving the credit provider notice of his new residential address.[60] It was argued on behalf of the appellant that proof of delivery of the letter of demand was still necessary for it to be effective.[61] Thus, the question before the court was whether the requirements of section 12(b) of the Hire-Purchase Act had been adequately complied with.[62]

In unpacking the amended section 12(b), the court referred to the precedent set in the *Weinbren* case, and noted that the issue that was presented in that case, that is, sending a letter of demand by registered post, was now statutorily permitted in terms of the amended section 12(b).[63] The judge stated that the reason for the amendment of section 12(b) may have been the direct result of the *Weinbren* case, because the legislature may have been made aware of the case.[64] The judge held that the argument presented on behalf of the appellant was incorrect because, if proof of delivery of the letter of demand was still necessary, then section 12(b) would not have been amended in the first place.[65] The judge was in support of the approach of the court *a quo* that "the 1965 amendment of the section constituted a material change in the language to such an extent that a change in the intention of the Legislature could be inferred".[66] Accordingly, the court of appeal held that the provisions of section 12(b) of the Hire-Purchase Act, as amended, were sufficiently complied with, notwithstanding the fact that the letter of demand did not actually reach the consumer.[67]

2.3 Credit Agreements Act

2.3.1 General

The Credit Agreements Act came into operation on 2 March 1981.[68] The Credit Agreements Act repealed and replaced the Hire-Purchase Act on the date it became operative.[69]

The Credit Agreements Act applied to a wider range of credit agreements than its predecessor, but only applied to categories of credit agreements as determined by the Minister from time to

[60] *Fitzgerald* par 367.
[61] *Fitzgerald* par 367.
[62] *Fitzgerald* par 367.
[63] *Fitzgerald* par 368.
[64] *Fitzgerald* par 369.
[65] *Fitzgerald* par 369.
[66] *Fitzgerald* par 369.
[67] *Fitzgerald* par 369.
[68] South African Law Commission *Working paper 46 Project 67* "The Usury Act and related matters" (1993) 28. See also Renke thesis 327.
[69] See Diemont and Aronstam 43.

time.[70] A credit agreement in terms of the Credit Agreements Act included a "credit transaction" or a "leasing transaction".[71] "Credit transaction" included an instalment sale transaction in terms of which goods were sold by the seller to the purchaser against payment by the purchaser to the seller of a stated or determinable sum of money at a stated or determinable future date, or in whole or in part in instalments over a certain agreed period in the future.[72] A "leasing transaction" meant a transaction in terms of which the lessor leased goods to the lessee, and the lessee would pay a stated or determinable sum of money at a stated or determinable date, or wholly or partly in instalments, over a certain agreed period in future.[73] Transactions wherein the State was the credit grantor, *inter alia*, were not included in the scope of application of the Credit Agreements Act.[74] The Credit Agreements Act applied to transactions amounting up to R500 000.[75] This meant that any transaction above the cap amount was excluded from its application.[76]

2.3.2 Debt enforcement in terms of the Credit Agreements Act

The Credit Agreements Act provided that the credit grantor must have complied with certain provisions in the Act before he could claim the return of the leased goods.[77] Section 11 of the Credit Agreements Act is of particular importance in this regard, and provided as follows:[78]

> "11. No credit grantor shall, by reason of the failure of a credit receiver to comply with any obligation in terms of any credit agreement, be entitled to claim the return of the goods to which the credit agreement relates unless the credit grantor by letter, handed over to the credit receiver and for which an acknowledgement of receipt has been obtained or posed by prepaid registered mail to the credit receiver at his address stated in the credit agreement in terms of section 5(1)(b) or the address changed in accordance with section 5(4), has notified the credit receiver that he so failed and has required of him to comply with the obligation in question within such period, being not less than 30 days after the date of such handing over or such posting, as may be stated in the letter, and the credit receiver has failed to comply with such requirement."

[70] S 2(1) of the Credit Agreements Act. See also Otto "Commentary: General" in Otto (ed) *Credit law service* (2010) ("Otto Commentary *Credit law service*") par 6; Kelly-Louw "The default notice as required by the National Credit Act 34 of 2005 (Part 2)" 2008 *SA Merc LJ* 203; Otto and Otto 2.
[71] S 1 of the Credit Agreements Act.
[72] S 1 of the Credit Agreements Act. See also Diemont and Aronstam 43-44; Otto Commentary *Credit law service* par 7; Renke thesis 344.
[73] However, it should be noted that a leasing transaction excludes transactions wherein the lessee will become the owner of the leased goods or will retain the leased goods at the end of the lease period. See s 1 of the Credit Agreements Act.
[74] S 2(1)(b) of the Credit Agreements Act.
[75] R946 in *GG* 11304 of 05 May 1988. Previously, the purchase price within the scope of application of the Credit Agreements Act did not to exceed R100 000.
[76] Otto Commentary *Credit law service* par 7.
[77] See Grové and Otto *Basic principles of consumer credit law* (2002) 43.
[78] S 11 of the Credit Agreements Act is similar to s 12(b) of the amended Hire-Purchase Act.

While the credit receiver was entitled to notification from the credit grantor, it is important to note that notification was not a necessity in instances where the credit grantor was already in possession of the goods, and also not where the credit receiver had handed over the goods to the credit grantor.[79]

The notice sent to the credit receiver by the credit grantor in terms of section 11 of the credit Agreements Act had to be in writing and contain the following:[80]

a. the nature of the breach of contract committed by the credit receiver or the defect that may give rise to a cancellation;

b. the steps that should have been taken by the credit receiver to remedy the position;

c. the period within which the credit receiver was to take the steps in (b) above; and

d. in the absence of a *lex commissoria*, a notice that the credit grantor would be able to cancel the agreement if the breach of contract or defect was not remedied.

The period in terms of which the credit receiver was to rectify the breach was not to be less than 30 days.[81] In addition, section 11 contained a proviso that the period within which the credit receiver was to rectify the breach was to be reduced to 14 days in the event that the credit receiver had failed on two or more occasions to comply with aid receiver's obligations in terms of the credit agreement.[82]

The credit grantor had the choice of sending the notice either by prepaid registered mail or by hand to the credit receiver.[83] Therefore, the period was calculated according to the manner in which the said notice was delivered.[84] If the notice was delivered by registered post to the credit receiver's most recent address, the period to rectify the breach started on the day after the notice was posted.[85] Otto provided in this regard that a notice was of no force or effect under section 11 of the Credit Agreements Act if it stated that the period to rectify the breach was to start running from the date of the letter instead of after the notice had been posted.[86] Alternatively, if the credit grantor opted to deliver the notice to the credit receiver, the period to rectify the

[79] Grové and Otto 43.
[80] Grové and Otto 43-44.
[81] S 11 of the Credit Agreements Act.
[82] S 11 of the Credit Agreements Act. See Grové and Otto 45.
[83] S 11 of the Credit Agreements Act. See also s 12(b) of the Hire-Purchase Act as amended.
[84] Grové and Otto 44.
[85] Grove & Otto 44; Otto Commentary *Credit law service* par 29.
[86] Otto Commentary *Credit law service* par 29.

breach was to start running on the day after delivery of the letter.[87] However, this option was more stringent, mainly because the credit receiver must have received the letter personally and acknowledged receipt of the letter by signing for it.[88]

A question raised in respect of section 11 of the Credit Agreements Act was what would happen if the notice was returned to the credit grantor undelivered.[89] There were two conflicting opinions in this regard. On the one hand, De Jager, in support of the judgment in *Fitzgerald*, opined that it was not necessary for the notice to have reached the credit receiver to be effective, because the most important factor was that it had been sent in accordance with the provisions of section 11 of the Credit Agreements Act.[90] On the other hand, Flemming opined that the only way in which non-receipt of the notice would be condoned was if the credit grantor was unable to deliver the notice.[91]

In consideration of the above conflicting opinions, the question that arose was whether it was necessary for the notice to reach the credit receiver under all circumstances.[92] In this regard, Otto, in support of the opinion of De Jager, stated as follows:

> "It cannot be laid down as an absolute rule that the notice must under all circumstances reach the credit receiver. A better view, it is suggested, is that the credit grantor has complied with section 11 if he has meticulously followed the technical requirements of the section, even though the notice may not reach the credit receiver, unless the credit grantor is aware of the fact that the notice did not reach its destination, and is still capable of effecting postal or personal service thereof … all the law should expect from him is to act reasonably to bring the notice to the credit receiver's attention."

In light of the above, this question was thus left to be answered by the courts. The court in *Marques v Unibank Ltd*[93] dealt with a situation where the appellant had entered into a written contract with the respondent for the purchase of a motor vehicle.[94] The provisions of the Credit Agreements Act were applicable to the contract that was before the court. The contract contained a clause that stated that, should the appellant fail to pay the instalments on time, the respondent could claim all payments due, or cancel the contract and claim the return of the

[87] Grové and Otto 44.
[88] Grové and Otto 44.
[89] Grové and Otto 44.
[90] De Jager *Credit Agreements and Finance Charges* (1981) 72.
[91] Flemming *Krediettransaksies* (1982) 318.
[92] Grové and Otto 44.
[93] 2001 (1) SA 145 (W) ("*Marques*").
[94] *Marques* par 146.

goods.[95] The appellant failed to pay the instalments on time and, as such, the respondent claimed cancellation of the agreement.[96] The respondent sent a section 11 notice to the appellant via registered post; however, it was returned marked "Unclaimed". The appellant argued that, because he did not receive the notice, the provisions of section 11 of the Credit Agreements Act had not been complied with.

The judge, in support of Otto's view,[97] held that it was not necessary for the notice in terms of section 11 of the Credit Agreements Act to have come to the attention of the appellant for it to be effective.[98] The judge further held that the fact that hand delivery of the notice in terms of section 11 must be brought to the attention of the credit receiver does not mean the same for delivery of the notice by registered post.[99] This decision was based on the literal interpretation of section 11.[100] The judge noted that section 11 provided that the credit grantor could not claim the return of goods until the credit receiver had been notified of his failure to comply with his obligations in terms of the credit agreement.[101] The judge remarked that the word 'notify' is different from 'inform', because the latter implies that the information must reach the person involved, whereas the former does not.[102] As such, he noted that the word 'inform' implies 'imparting knowledge', which means that the knowledge must reach the attention of the intended person. He further remarked that, while 'notify' may mean 'inform', it could also refer to 'giving notice', and to give notice does not mean that the information must be brought to the attention of the person it is meant to address.[103] As such, the judge provided that "it is the duty of every credit receiver to ensure that communication sent to him at the *domicilium* he has provided does come to his attention.[104] His failure to do so should not in my view redound to

[95] *Marques* par 147. Clause 10a of the contract provided that, should the appellant fail to pay the instalments on time, "[T]hen, and upon the happening of any of these events, the seller shall be entitled in its election and without prejudice to any rights to:

i. claim immediate payment of all amounts payable in terms hereof, irrespective of whether or not such amounts are at that stage; or
ii. cancel this Agreement, take repossession of the Goods, retail all payments already made in terms hereof by the Consumer and to claim as liquidated damages, payment of the difference between the balance outstanding and the resale value of the Goods determined in accordance with clause 10b."

[96] *Marques* 148.
[97] Otto Commentary *Credit law service* par 29.
[98] *Marques* par 151.
[99] *Marques* par 151.
[100] *Marques* 155.
[101] *Marques* par 155.
[102] *Marques* par 156.
[103] *Marques* par 156.
[104] *Marques* par 154.

the disadvantage of the credit grantor."[105] Thus, the court in this case found that the respondent had complied with all provisions in terms of section 11 of the Credit Agreements Act.[106]

2.3.3 Preliminary remarks

The two predecessors to the NCA, the Hire-Purchase Act and the Credit Agreements Act, both contained provisions in respect of debt enforcement. These notices, in section 12 and 11 respectively, had the aim to protect "credit receivers". The Credit Agreements Act enjoyed a wider field of application than the Hire-Purchase Act, which meant that the Credit Agreements Act and the debt enforcement provisions in section 11 thereof, at least in theory, protected a wider field of credit receivers who had committed breach of contract.

The Hire-Purchase Act was amended materially in 1965, in the form of the Hire-Purchase Amendment Act. However, the section 12 Hire-Purchase Act enforcement notice, before and after the amendment of the Act, applied only if the seller wanted to enforce specified remedies in the Act, such as acceleration- or penalty clauses. Where the Hire-Purchase Act, before its amendment, required only a written demand notice, the amended Act provided how the written letter had to be brought to the consumer's attention, namely in person or by registered mail. The amended version of section 12(b) of the Hire-Purchase Act therefore contained more detailed provisions. Section 12 Hire-Purchase Act referred to "made demand" to the consumer to rectify the breach of contract.

The debate whether the written notice had to reach the consumer in order to be effective started with the Hire-Purchase Act, with the courts being in two minds. In one case, it was held that the consumer must personally be made aware of the demand in writing, while the court in the other case, which was decided after the 1965 amendment, held that section 12(b) was complied with even though the letter of demand did not actually reach the consumer.

The Credit Agreements Act's section 11 demand notice applied only to claims for the return of the goods. Once again, a written demand letter to the credit receiver was required, and the methods of delivery provided the options of by hand or prepaid registered mail at the address stipulated in the credit agreement, or the credit receiver's changed address. The credit grantor had to stipulate in the notice that breach of contract had occurred and had to require that the consumer rectify the breach.

[105] *Marques* par 154.
[106] *Marques* par 158.

The debate whether the notice had to have reached the credit receiver to be effective continued, and authors' opinions in this regard differed. They also differed with regard to the effect of a section 11 notice that was returned marked 'Undelivered'. Section 11 provided that the credit receiver must have been "notified" of the breach, accompanied by the request to rectify the obligations in arrears. The court in *Marques* differentiated between 'inform' and 'notify'. If the consumer must be informed, the information must reach the credit receiver, which is not required in the case of 'notify'. The court held that 'notified', which could include giving notice, did not mean the information in the notice had to be brought to the credit receiver's attention. Accordingly, in *Marques*, the duty had rested on the credit receiver to have ensured that the notice came to her attention. The wording used by the legislature in the debt enforcement provision in a particular Act seems important.

CHAPTER 3

DEBT ENFORCEMENT IN TERMS OF THE ALA AND THE NCA

3.1 Introduction

The focus of this chapter is the debt enforcement notices that must be sent to a consumer before legal proceedings can be instituted in court by the credit provider in terms of the credit legislation that is currently applicable in South Africa, the ALA and the NCA. Case law is also considered.

3.2 ALA

3.2.1 General

The majority of the provisions of the ALA, as amended, came into operation on 19 October 1982.[107] The ALA repealed and replaced the Sale of Land Act,[108] and exists and applies in conjunction with the NCA.[109] Its main purpose is to regulate the alienation of land in certain circumstances, and to provide for matters that are connected with such circumstances.[110]

3.2.2 Application of chapter II of the ALA

Chapter II of the ALA deals with consumer credit contracts in relation to land.[111] However, the field of application of the chapter is not covered in the chapter itself.[112] Kelly-Louw provides in this regard that the definitions provided in the ALA should be looked at in order to establish the chapter's field of application.[113]

The word "contract" is used throughout Chapter II, which indicates that the chapter applies mainly to contracts of sale, and not to donations or contracts of exchange.[114] The definition of "land" in Chapter II provides that it includes "any unit; any right to claim transfer of land; any undivided share in land; and initial ownership in terms of section 62 of the Development

[107] *GG* 8344 GN R148 of 20 August 1982; *GG* 8918 GN R148 of 07 October 1983; Kelly-Louw "Alienation of Land Act" *LAWSA* (2014) par 182.
[108] Govender and Kelly-Louw 2018 *PER/PELJ* 9.
[109] Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012).
[110] Preamble of the ALA.
[111] Kelly-Louw "Application of chapter II" in Kelly-Louw (ed) (Kelly-Louw "Application of chapter II" *LAWSA*) par *LAWSA* par 190.
[112] Kelly-Louw "Application of chapter II" par *LAWSA* 190.
[113] Kelly-Louw "Application of chapter II" par *LAWSA* 190.
[114] Kelly-Louw "Application of chapter II" par *LAWSA* 190.

Facilitation Act".[115] Kelly-Louw remarks that Chapter II thus applies only to the sale of residential land, and specifically excludes agricultural land.[116] Therefore, the use of the word "contract" limits the application of Chapter II to contracts of sale that are characterised by the payment of three or more instalments for a period of more than one year.[117] It should be noted that the sale of residential land, which is characterised by the payment of instalments, can also be governed by the provisions of the NCA.[118] In this case, both the ALA and NCA will apply to such a sale.[119] This means that the seller will have to comply with the requirements set out in the ALA as well as any provisions and notices set out in the NCA. However, in terms of Schedule 1 to the NCA, read with section 172,[120] in cases where there is a conflict between the provisions of Chapter II of the ALA and those of the NCA, the NCA will prevail.[121] Kelly-Louw remarks that the NCA will still govern contracts of sale of residential property or of any other land that falls outside the ambit of the ALA, provided that it constitutes a credit agreement to which the NCA applies.[122]

3.2.3 Debt enforcement in terms of the ALA

3.2.3.1 General

Chapter II, specifically section 19, of the ALA, is of particular importance because it deals with debt enforcement. Section 19 provides as follows:

> "(1) no seller is, by reason of any breach on the part of the purchaser, entitled –
>
> (a) to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract;
> (b) to terminate the contract; or
> (c) to institute an action for damages
>
> unless he has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand.

[115] S 1 of the ALA.
[116] Kelly-Louw "Application of chapter II" *LAWSA* par 190.
[117] Kelly-Louw *LAWSA* "Application of chapter II" par 190.
[118] Kelly-Louw *LAWSA* "Application of chapter II" par 190. See further Govender and Kelly-Louw 2018 *PER/PELJ* 9.
[119] In *Amardien v The Registrar of Deeds* 2017 (2) All SA 431 (WCC) ("*Amardien*"), the court had to reconcile the notice provisions in s 19 ALA and s 129(1)(a) of the NCA. The CC in *Amardien v The Registrar of Deeds* [2018] ZACC held that the s 19 ALA and the s 129(1)(a) NCA notice serve different purposes, and that recourse to Sch 1 in the NCA, discussed below, is thus not required. See Otto and Renke *Guide* introduction par 1.3.4.
[120] In terms of s 172(1), in case of conflict between the provisions of the NCA as mentioned in the first column of the table provided in Schedule 1, and a provision of any other Act as set out in the second column, the conflict must be resolved in terms of the rules set out in the third column of said table.
[121] Kelly-Louw *LAWSA* "Application of chapter II" 190.
[122] Kelly-Louw *LAWSA* "Application of chapter II" par 190. The scope of application of the NCA is discussed in par 3.3.2.

(2) a notice referred to in subsection (1) shall be handed to the purchaser or shall be sent to her by registered post to his address referred to in section 23 and shall contain –

(a) a description of the purchaser's alleged breach of contract;
(b) a demand that the purchaser rectify the alleged breach within a stated period, which, subject to the provisions of subsection (3), shall not be less than 30 days calculated from the date on which the notice was handed to the purchaser or sent to her by registered post, as the case may be; and
(c) an indication of the steps the seller intends to take if the alleged breach of contract is not rectified.

(3) if the seller in the same calendar year has so handed or sent to the purchaser two such notices at intervals of more than 30 days, he may in any subsequent notice so handed or sent to the purchaser in such calendar year, make demand to the purchaser to carry out his obligations within a period of not less than seven days calculated from the date on which the notice was so handed or sent to the purchaser, as the case may be.

(4) subsection (1) shall not be construed in such a manner as to prevent the seller from taking steps to protect the land and improvement thereon or, without or after notice as required by the said subsection, from claiming specific performance."

A notice in terms of section 19 of the ALA must be sent to the purchaser upon default, regardless of its nature, and the purchaser must be given 30 days to rectify such breach.[123] It should be noted that a section 19 notice is not always necessary. For instance, it is not necessary to send a section 19 notice where the cause of default is misrepresentation.[124] However, a section 19 notice is necessary in cases where the seller wishes to enforce an acceleration clause contained in the contract, or any other penalty clause, or cancel the contract, or claim damages.[125]

3.2.3.2 Delivery of the section 19 notice

A section 19 notice can be delivered to a purchaser either by hand or by registered post.[126] However, if a seller chooses to send a notice to the purchaser by hand, such notice should reach the consumer personally, and no one else.[127] Should a seller send the notice by any other form of mail, except for registered post, such notice will be defective.

The notice should be sent to the purchaser's residential or business address as chosen in the contract.[128] If the purchaser's address changes, such change noted in writing and delivered to the seller, or sent by registered post.[129] The seller is allowed to ignore a change of address if it

[123] Kelly-Louw "Demands by seller before taking certain actions: when a notice must be sent" in Kelly-Louw (ed) *LAWSA* (Kelly-Louw "When a notice must be sent" *LAWSA*) par 210(b).
[124] Kelly-Louw "When a notice must be sent" *LAWSA* par 210(b).
[125] Kelly-Louw "When a notice must be sent" *LAWSA* par 210(b).
[126] Kelly-Louw "Demands by seller before taking certain actions: formal requirements regarding notice" in Kelly-Louw *LAWSA* (Kelly-Louw "Formal requirements regarding notice" *LAWSA*) par 210(c)
[127] *Maharaj.*
[128] S 6(1) of the ALA. See also Kelly-Louw "Contents of contract" in Kelly-Louw (ed) *LAWSA* (Kelly Louw "Contents of contract" *LAWSA*) par 193.
[129] S 23 of the ALA.

was delivered or sent incorrectly, and may opt to send a section 19 notice to the purchaser's address as chosen in the contract.[130]

3.2.3.3 Is actual receipt necessary for the notice to be effective?

An issue with regard to a section 19 ALA notice is whether section 19 has been complied with if the seller sent the notice in the prescribed manner, but such notice never reached the consumer for reasons that include the notice not being collected or it being returned to the seller.[131] This question was dealt with in case law.

In *Holme v Bardsley*,[132] the seller entered into a contract with the purchaser for the sale of immovable property. The seller applied to the court for the cancellation of the contract and to have the purchaser ejected from the contract. The seller had sent two section 19 notices to both of the purchaser's addresses as chosen in the contract. However, both notices were returned to the seller marked "Unclaimed".[133] It was contended on behalf of the purchaser that the seller did not comply with section 19 of the ALA.[134] The court relied on the *Maharaj* case, and remarked that, while section 19 is similar to section 12 of the Hire-Purchase Act, an acknowledgment of receipt is no longer required.[135] The court held that the seller had failed to comply with the provisions of section 19, and that she was not entitled to cancel the contract or eject the purchaser from the contract.[136] Therefore, the court held that, for a section 19 notice to be effective, it had to have reached the purchaser.

However, the *Holme* decision was criticised and rejected by the court in *Marques*.[137] The *Marques* judgment was delivered with reference to section 11 of the Credit Agreements Act. However, the court in *Marques* referred to the ALA in its decision, and further distinguished the case from the *Maharaj* case.[138] The court in *Marques* rejected the *Holme* judgment and held that it was not necessary for the notice in terms of the Credit Agreements Act to reach the credit receiver.[139]

---

[130] Kelly-Louw "Formal requirements regarding notice" *LAWSA* par 210(c).
[131] Kelly-Louw "Demands by seller before taking certain actions: receipt of notice" in Kelly-Louw (ed) *LAWSA* (Kelly-Louw "Receipt of notice" *LAWSA*) par 210(d).
[132] 184 (1) SA 429 (W) ("*Holme*").
[133] *Holme* par 430.
[134] *Holme* par 430.
[135] *Holme* par 431D.
[136] *Holme* par 431G.
[137] Par 2.3.2.
[138] Par 2.3.2.
[139] *Marques* par 155.

3.3 NCA

3.3.1 General

The NCA[140] came into operation in piecemeal fashion: on 1 June 2006, 1 September 2006, and 1 June 2007.[141] Chapter 6, Part C, which is of particular importance to this discussion, came into operation on 1 June 2007.[142] One of the purposes of the NCA is to protect the consumer by,[143] *inter alia*, providing for a consistent and harmonised system of debt restructuring, enforcement, and judgment, which prioritises the satisfaction of all responsible consumer obligations under credit agreements.[144]

3.3.2 Scope of application of the NCA

Otto and Otto remark that the NCA applies to a wider range of credit agreements than its predecessors because it applies to credit agreements irrespective of the amount of credit involved.[145] The scope of application of the NCA is contained in Chapter 1, Parts B and C. The NCA generally applies to all credit agreements between parties dealing at arm's length[146] and concluded within, or having an effect within, the Republic.[147] The term "credit agreement" in the Act is made up of three main categories, namely the credit facility, the credit transaction, and the credit guarantee.[148]

A credit facility in terms of the Act is an agreement in terms of which the credit provider undertakes to supply goods or services, or to pay an amount or amounts of money, to a consumer, from time to time.[149] Further, the credit provider must undertake to defer the payment of any part of the cost of the goods or services, as well as the repayment of the loan

[140] All subsequent references to sections and regulations will be in accordance with the Act, unless otherwise indicated.
[141] Otto and Otto par 5.
[142] Ch 6 Part C includes debt enforcements procedures and collection practices, the settlement of accounts and surrender of goods. See also Otto and Otto par 44.
[143] S 3 sets out the objectives of the NCA.
[144] S 3(i).
[145] Otto and Otto par 3.
[146] This, in essence, means that the parties to the credit agreement are independent of each other when concluding the credit agreement. S 4(2)(b) provides for instances where credit agreements are not entered into "at arm's length", and thus not subject to the NCA. A credit agreement between family members serves as an example, provided that they are dependent on each other.
[147] S 4(1).
[148] S 8(1). For purposes of this discussion, categories of a credit agreement will only be mentioned to provide context. For a discussion of the credit agreements subject to the NCA, see Otto and Renke "Types of credit agreement" in Scholtz (ed) *Guide to the National Credit Act* (2008) ("Otto and Renke Agreements") ch 8.
[149] S 8(3)(a)(i). See Otto and Renke Agreements par 8.2.2.

amount, or to bill the consumer periodically for any part of the cost of goods or services or any part of the loan amount.[150] A credit transaction, on the other hand, involves one of the following eight agreements: a pawn or discount transaction; an incidental credit agreement; an instalment agreement; a mortgage agreement or secured loan; a lease; and any other agreement, except for a credit facility or credit guarantee in terms of which payment is deferred and a fee, charge, or interest is payable to the credit provider (for the deferral).[151]

Lastly, a credit guarantee is an agreement in terms of which a person agrees or promises to fulfil, upon demand, any obligation of another consumer in terms of a credit facility or credit transaction to which the Act applies.[152]

However, the Act does not apply to credit agreements where the consumer belongs to certain groups of juristic persons,[153] or is the State or an organ of State.[154] Two characteristics that all credit agreements have in common are the extension of credit (deferral of payment), where a fee, charge, or interest is payable,[155] or, in the case of the discount agreement, a discount is granted if the debt is paid on an earlier, and not the later, stipulated date.[156]

3.3.3 Debt enforcement in terms of the NCA

3.3.3.1 General

The NCA puts a limitation on a credit provider's right to enforce a credit agreement in the event of a breach of contract by a consumer.[157] However, the credit provider's right to enforce the agreement is not forbidden, but merely curtailed, in a bid to protect consumers against abuse.[158] The curtailment of such right is contained in sections 129 and 130 of the Act.

Section 129(1)(a) and (b) of the NCA is important, and provides as follows:

---

[150] S 8(3)(b)(ii).
[151] S 8(4)(a)-(f). See Otto and Renke Agreements par 8.2.3.
[152] S 8(5). Otto and Renke Agreements par 8.2.4.
[153] This concept is defined in s 1, and includes partnerships, associations of persons, and trusts having three or more natural person trustees or a juristic person as a trustee. The NCA does not apply to juristic persons with an asset value or annual turnover of R1 million or more, or to smaller juristic persons that conclude large credit agreements. See s 4(1)(a)(i) and 4(1)(b) read with the Determination of Thresholds, GN R 713, *GG* 28893, 1 June 2006 ("Threshold Regs"). A large agreement is a mortgage agreement or any other credit transaction with a principal debt of R250 000 or more. S 9(4) read with the Threshold Regs.
[154] S 4(1)(a)(ii)-(iii). For other exclusions, see s 4(1)(c) and (d). The NCA also does not apply to insurance agreements, leases of immovable property, or transactions between a stokvel and its members. "Stokvel" is defined in s 1.
[155] The exception is the mortgage agreement and the secured loan.
[156] Otto and Otto par 11.
[157] Otto and Otto par 44.1.
[158] Otto and Otto par 44.1.

"(1) If the consumer is in default under a credit agreement, the credit provider –

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

Section 130 of the NCA provides the following:

"Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

a. at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), on in section 129(1), as the case may be;
b. in the case of a notice contemplated in section 129(1), the consumer has –
    i. not responded to that notice; or
    ii. responded to that notice by rejecting the credit provider's proposals."

3.3.3.2 Meaning of the word "may" in section 129(1)(a)

Section 129(1)(a) provides that the credit provider "may draw the default to the notice of the consumer". The word "may" is misleading, because it has the effect of creating the impression that the credit provider is not required to comply with the section 129(1)(a) procedure before enforcing the debt.[159] However, section 129(1)(a) read together with section 129(1)(b) and section 130(1) makes it clear that section 129(1)(a) must be complied with before a credit provider undertakes to enforce a debt.[160]

A credit provider is prohibited from commencing with debt enforcement proceedings before complying with section 129(1)(a).[161] Further, section 130(1)(a) provides that a credit provider may only approach the court for an order to enforce a credit agreement in cases where the consumer has been in default for 20 business days and at least 10 business days have passed since the credit provider sent such notice.[162] Section 130(1)(b) also provides that proceedings for the enforcement of a debt may only commence if the consumer failed to respond to the notice, or responded by rejecting the proposals contained in such notice.[163]

[159] Van Heerden "Enforcement of credit agreements" in Scholtz (ed) *Guide to the National Credit Act* (2008) par 12.4.2 ("Van Heerden *Guide* Enforcement").
[160] Van Heerden *Guide* Enforcement par 12.4.2.
[161] S 129(1)(b)(i).
[162] S 130(1)(a).
[163] S 130(1)(b).

Section 129(1)(a) neither limits nor specifies the type of credit agreements to which the section applies, and "does not limit this requirement to claims for the return of goods only".[164] Thus, it appears that, whenever a consumer is in default in respect of a credit agreement, irrespective of the type of credit agreement and the relief sought by the credit provider, a section 129(1)(a) notice must be delivered to the consumer.[165] However, van Heerden and Otto submit that compliance with the provisions of section 129(1)(a) is necessary only if the credit provider intends to commence debt enforcement proceedings following delivery of the notice.[166] Further, in terms of section 129(1)(b)(i), a section 129(1)(a) notice is required before commencement of debt enforcement proceedings.[167] In this regard, section 129(1)(b)(i) makes the delivery of a section 129(1)(a) notice a prerequisite for the commencement of debt enforcement proceedings.[168] Van Heerden and Otto submit that, therefore, a creditor who has no intention of instituting legal proceedings but merely requires the payment of a debt need not deliver a section 129(1)(a) notice, but should rather send a letter of demand to the consumer.[169]

Van Heerden, in this regard, states that compliance with section 129(1)(a) is a 'gateway' to debt enforcement litigation.[170] Van Heerden also provides that compulsory compliance with section 129(1)(a) is an attempt by the legislature to encourage parties to a credit agreement to sort out their differences without resorting to litigation.[171] As such, she submits that viewing section 129(1)(a) in this way resonates with the Act's aim of protecting consumers.[172]

Additionally, in *Sebola v Standard Bank of South Africa Ltd*,[173] it was held that the provisions contained in section 129(1)(a) are aimed at helping debtors restructure their debts or find relief prior to cancellation of their credit agreements or enforcement thereof.[174] In *Absa v de Villiers*,[175] the court held that it is obligatory for a credit provider to comply with section 129(1)(a), because it provides that a credit provider may not commence any legal proceedings

[164] Van Heerden and Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 661. See also Van Heerden *Guide* Enforcement par 12.4.2.
[165] Van Heerden and Otto 2007 *TSAR* 661. See also Van Heerden *Guide* Enforcement par 12.4.2.
[166] Van Heerden and Otto 2007 *TSAR* 661.
[167] S 129(1)(b)(i).
[168] Van Heerden and Otto 2007 *TSAR* 661.
[169] Van Heerden and Otto 2007 *TSAR* 661. See further s 130(4)(b) where it is stated that, should the credit provider later wish to commence debt enforcement proceedings, he should send a section 129(1)(a) notice to the consumer, otherwise the court will not take part in the matter.
[170] Van Heerden *Guide* enforcement par 12.4.2.
[171] Van Heerden *Guide* enforcement par 12.4.2.
[172] Van Heerden *Guide* enforcement par 12.4.2.
[173] 2012 (5) SA 142 (CC) ("*Sebola*").
[174] *Sebola* par 59.
[175] 2009 (5) SA 40 (C) (*De Villiers*").

before a notice is sent to a consumer and the provisions of section 130 have been complied with.[176] Further, in *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*,[177] the court held that it is a requirement that a section 129(1)(a) notice be delivered to a consumer before such consumer's obligations are enforced.[178]

In *Rossouw v Firstrand Bank*,[179] on the question of whether delivery of a section 129(1)(a) notice was compulsory, the Supreme Court of Appeal[180] held as follows:[181]

> "[I]n the circumstances, the bank did not prove that it delivered the notice. As pointed out earlier, sections 129(1)(b)(i) and 130(1)(b) make this a peremptory prerequisite for commencing legal proceedings under a credit agreement and a critical cog in a plaintiff's cause of action. Failure to comply must, of necessity, preclude a plaintiff from enforcing its claim…"

In view of the decision in *Rossouw*, the court in *Nedbank v National Credit Regulator*[182] held that, despite the use of the word "may" in section 129(1)(a), delivery of the notice was a prerequisite for the enforcement of a debt arising from a credit agreement.[183]

3.3.3.3 Time limits applicable to the notice

Section 129(1)(a) does not provide any indication as to the time limits that apply to the notice.[184] However, section 130(1)(a) provides more clarity in this regard.[185] In terms of section 130(1)(a), a credit provider may only approach the court for an order to enforce a credit agreement in the case where the consumer has been in default for 20 business days and at least 10 business days have passed since the credit provider delivered such notice.[186] Therefore, it appears that a consumer has at least 10 business days from receipt of the notice to respond to such notice.[187]

---

[176] *De Villiers* par 24 – 27.
[177] 2009 (2) SA 512 D ("*Prochaska"*).
[178] *Prochaska* par 55.
[179] 2010 (6) SA 439 (SCA) ("*Rossouw*").
[180] "SCA".
[181] *Rossouw* par 37.
[182] 2011 (3) SA 581 (SCA) ("*Nedbank*").
[183] *Nedbank* par 8. See also Renke, Roestoff and Haupt "The National Credit Act: New parameters for the granting of credit in South Africa" 2007 *Obiter* 229.
[184] Van Heerden *Guide* Enforcement par 12.4.4; Van Heerden and Boraine "The conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act" 2011 *SA Merc LJ* 47.
[185] Van Heerden and Boraine 2011 *SA Merc LJ* 47.
[186] S 130(1)(a).
[187] Van Heerden *Guide* Enforcement par 12.4.3. See also van Heerden and Boraine 2011 *SA Merc LJ* 48. In terms of s 2(5):
"[W]hen a particular number of business days is provided between the happening of one event and another, the number of days must be calculated by:
a. excluding the day of which the first event occurs;
b. including the day on, or by which the second event is to occur;

Otto and Otto, in respect of the 20 and 10 business days periods, submit that, although these days do not run consecutively, they can run concurrently.[188] They further submit that, if the legislature wanted the periods to run consecutively, it could have provided that in the Act itself, by providing that enforcement may not occur less than 20 business days after the 10 business days have elapsed.[189]

It was held in *Standard Bank of South Africa Ltd v Bekker*[190] that a credit provider should only approach a court for an order to enforce a credit agreement if the full 10 business days referred to in section 130(1)(a) have elapsed.[191]

Van Heerden submits that the credit provider should, in the section 129(1)(a) notice, specify to the consumer that a response to or rejection of the proposals contained therein should be done within 10 business days from receipt thereof.[192] However, a consumer is not obligated or compelled to respond to a section 129(1)(a) notice.[193] Thus, a consumer is afforded a choice to either respond to the notice or follow up with the proposals contained in the notice.[194]

In *Ntwendala v Nedbank Ltd*,[195] the court held that consumers who ignore the proposals made by a credit provider in the section 129(1)(a) notice do so to their disadvantage.[196] Consumers disadvantage themselves further if they reject the proposals made by the credit provider because, according to the court, it means that the consumers refuse to consult one of the credit agents made available in terms of the NCA to assist them, or they are rejecting the remedies available under section 129.[197]

In *BMW Financial Services (SA) (Pty) Ltd v Forefront Trading CC and Another*,[198] the court held that a credit provider is not compelled by the NCA to accept an overdue or late response from the consumer to a section 129(1)(a) notice.[199] Further, a credit provider is not prohibited

c. excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b) respectively."

[188] Otto and Otto 44.3. See also van Heerden and Otto 2007 *TSAR* 661-662.
[189] Otto and Otto 44.3.
[190] 2011 (6) SA 252 (GSJ) ("*Bekker*").
[191] *Bekker* par 13.
[192] Van Heerden *Guide* Enforcement par 12.4.3.
[193] Van Heerden *Guide* Enforcement par 12.4.3.
[194] Van Heerden *Guide* Enforcement par 12.4.3.
[195] 2014 ZAECELLC 2 ("*Ntwendala*").
[196] *Ntwendala* par 20.
[197] *Ntwendala* par 20.
[198] Unreported case number 12331/09 (KZD) decided on 17 March 2010 ("*Forefront Trading CC*").
[199] *Forefront Trading* par 10.

from lawfully cancelling a credit agreement (once entitled to do so) on the grounds of an overdue referral to an alternative dispute-resolution agent.[200]

Therefore, a credit provider may, in terms of section 130(1)(a), commence with debt enforcement proceedings if the consumer has been in default for 20 business days and at least 10 business days have passed since the consumer received a section 129(1)(a) notice.

3.3.3.4 Method of notification and delivery

As mentioned above,[201] a credit provider is required to bring a consumer's default to the consumer's notice. However, section 129(1)(a) does not prescribe the manner in which this must be done.[202] The Act does not contain a definition of the word "delivery".[203] However, Regulation 1[204] states that "delivered", "unless otherwise provided for, means sending a document by hand, by fax, by email, or registered mail to an address chosen in the agreement by the recipient or, if no such address is available, the recipient's registered address".[205] Section 65 of the Act deals with the concept of delivery and the right to receive documents.[206] It provides that every document that is required to be delivered to a consumer in terms of the NCA must be delivered in the prescribed manner, if any.[207] If there is no prescribed method of delivery of a particular document to a consumer, the person required to deliver the document must:[208]

> "a. make the document available to the consumer through one or more of the following mechanism –
>
> i. in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;
> ii. by fax;
> iii. by email; or
> iv. by printable web page; and
>
> b. deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a)."

In this regard, Van Heerden and Otto provide that a consumer can, in terms of section 65, choose a preferred method of delivery of the notice.[209] However, van Heerden and Otto point

[200] *Forefront Trading* par 10.
[201] Par 3.3.3.1.
[202] Van Heerden *Guide* Enforcement par 12.4.4.
[203] Van Heerden *Guide* Enforcement par 12.4.4.
[204] Of the Regulations made in terms of the NCA, GN R489 *GG* 28864, 31 May 2006 ("NCA Regs").
[205] Reg 1 to the NCA. See also Van Heerden *Guide* Enforcement par 12.4.4.
[206] S 65. Van Heerden *Guide* Enforcement par 12.4.4. Van Heerden and Boraine 2011 *SA Merc LJ* 48.
[207] S 65(1).
[208] S 65(2).
[209] Van Heerden and Otto 2007 *TSAR* 662.

out that section 65 deviated from the way in which letters of demand were usually delivered, because it provides for delivery by ordinary mail instead of registered mail.[210] It is clear that, where a consumer chooses the notice to be delivered by ordinary mail rather than registered mail, it could create evidentiary problems as, without a receipt, it would be difficult for the credit provider to prove that a section 129(1)(a) notice was delivered.[211] The question then is whether the credit provider's claim can be dismissed based on a defence that the letter got lost in the post.[212]

The provisions of section 168 are essential as regards the delivery of the notice. Section 168 provides that, unless indicated otherwise in the Act, a notice, order, or other document that must be served on a person is properly served when it has either been delivered to that person or sent by registered mail to that person's last known address.[213] Although section 168 uses the word "served" instead of "delivered", it is relevant in this context, because the word "service" as used in this section means nothing more than "delivery".[214]

3.3.3.5 Should the notice come to the 'actual attention' of the consumer?

The issue of how a notice should be delivered has been a controversial topic, and has been dealt with extensively in cases.[215] The question is whether a section 129(1)(a) notice should actually reach the consumer for it to be effective.[216] There were two schools of thoughts with regard to this question, one which followed a strict and rigid approach and another which followed a more flexible approach.[217]

The court in *Prochaska* followed the strict and rigid approach. In this case, the credit provider sent a section 129(1)(a) notice to a consumer.[218] However, the address to which the notice was addressed was incorrect.[219] The court was faced with the question whether the notice had to reach the consumer.[220] In considering this question, the court did not address the meaning of

[210] Van Heerden and Otto 2007 *TSAR* 662.
[211] Van Heerden and Otto 2007 *TSAR* 662.
[212] Van Heerden and Otto 2007 *TSAR* 662.
[213] S 168.
[214] Van Heerden and Boraine 2011 *SA Merc LJ* 48.
[215] Van Heerden *Guide* Enforcement par 12.4.4.
[216] Van Heerden *Guide* Enforcement par 12.4.4. See also van Heerden and Boraine 2011 *SA Merc LJ* 49; Van Heerden and Otto 2007 *TSAR* 662.
[217] Govender and Kelly-Louw 2018 *PER/PELJ* 12.
[218] *Prochaska* par 8.
[219] *Prochaska* par 11.
[220] *Prochaska* par 11.

"delivery" for the purpose of section 129(1)(a).[221] However, the court held that the words "draw the default to the notice of the consumer", "providing notice", and "delivered a notice" as these appear in section 129(1)(a) and (b) and sections 130(1)(a) are reflective of the legislature's intention to impose upon the credit provider a stricter obligation to do more than merely dispatching the default notice to comply with its statutory obligations.[222] Thus, the court held that the credit provider is obligated to bring the notice to the attention of the consumer in a manner that assures the court that, in considering whether the procedural requirements of sections 129 and 130 had been properly complied with, the default had been drawn to the attention of the consumer.[223] However, the court did not set out requirements as to how the credit provider was required to deliver the default notice.[224] The implication is that it had to reach the consumer.[225] The court held that, if a consumer had chosen an address at which the default notice was to be delivered, it was the credit provider's duty to ensure that the address to which the default notice was sent is similar (in every respect) to the one chosen by the consumer in the agreement.[226]

Compared to the stricter approach, other courts were more flexible and of the view that it was not a requirement for the section 129(1)(a) notice to come to the attention of the consumer, as long as the notice reached the consumer's address.[227] In *Munien v BMW Financial Services*,[228] the court considered sections 65, 96, and 168 of the NCA and the definition of "delivered" in accordance with Regulation 1.[229] In handing down judgment, Wallis J asked whether a section 129(1)(a) notice is to be considered delivered if it was sent by registered post to the address and in the manner chosen by the consumer, and whether it came to the attention of the consumer.[230] The court held that that this should be answered in the affirmative, because it was of the view that a consumer bears a risk when selecting an address and manner in which the notice must be delivered.[231] The court, in reference to the definition of "delivered", held that a section 129(1)(a) notice is considered to have been delivered if it was sent by registered post to the consumer's preferred address, regardless of whether it came to the consumer's

[221] Govender and Kelly-Louw 2018 *PELJ* 12.
[222] Kelly-Louw 2010 *SA Merc LJ* 580. *Prochaska* par 56 mentions "stricter interpretation".
[223] *Prochaska* par 55.
[224] Kelly-Louw 2010 *SA Merc LJ* 581.
[225] Govender and Kelly-Louw 2018 *PELJ* 12.
[226] *Prochaska* par 55.
[227] Govender and Kelly-Louw 2018 *PELJ* 13.
[228] 2010 (1) SA 549 (KZD) ("*Munien*").
[229] Govender and Kelly-Louw 2018 *PER/PELJ* 13.
[230] *Munien* par 12.
[231] *Munien* par 14.

attention.[232] Therefore, the court held that the sending of the notice, and not the receipt thereof, is the "delivery".[233]

Despite the court's attempt in *Munien* to interpret the provisions of section 129(1)(a) together with the meaning of "delivered" in section 168 of the Act, its decision was rejected in *Firstrand Bank Ltd v Dhlamini*,[234] where the court reverted to the strict interpretation of section 129(1)(a). The court in *Dhlamini* differentiated the word "delivery" as contemplated in section 65 from "drawing the default to the notice of the consumer" as contemplated in section 129(1)(a). The judge provided that the way in which both sections were interpreted in *Munien* was an error, because Wallis J "elevated the right of the consumer to receive documents by a certain method to an irrebuttable presumption of notice of the default arising on despatch by one of the methods".[235] The court further provided that the legislature excluded the word 'delivered' in section 129(1)(a) because delivery alone is not sufficient; the consumer must also be made aware of the default.[236] Therefore, the court took into consideration the purpose of the NCA in section 3, and held, in support of the judgement in *Prochaska*, that it was a necessity for the credit provider to bring the default to the notice (attention) of the consumer.[237]

The court in *Starita v Absa Bank Ltd*,[238] however, took the same approach taken in *Munien*, thereby rejecting the judgements in both *Prochaska* and *Dhlamini*.[239] In this case, the court held that it is a fallacy to interpret the expressions contained in the NCA by applying definitions contained in Regulation 1.[240] The court held that the definition of "delivered" as contained in Regulation 1 should not be used to interpret the meaning of the words contained in section 129(1)(a).[241] In this regard, the court referred to section 168, and provided that it applies to the delivery of the section 129(1)(a) notice.[242] The court confirmed that, not only can a section 129(1)(a) notice be sent by ordinary mail, it could also be sent by registered mail.[243] Gautschi J held that receipt of the notice by the consumer is not a prerequisite; it is sufficient if it is sent

[232] *Munien* par 12.
[233] *Munien* par 12.
[234] 2010 (4) SA 531 (GNP) ("*Dhlamini*").
[235] *Dhlamini* par 26.
[236] *Dhlamini* par 27.
[237] *Dhlamini* par 28.
[238] 2010 (3) SA 443 (GSJ) ("*Starita*").
[239] Otto "Notices in terms of the National Credit Act: Wholesale national confusion – *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors; Munien v BMW Financial Services; Starita v Absa Bank Ltd; Firstrand Bank v Dhlamini*" 2010 *SA Merc LJ* 603.
[240] *Starita* par 18.4.
[241] *Starita* par 18.4.
[242] *Starita* pars 18.5 – 18.7.
[243] *Starita* pars 18.5 – 18.7.

by registered mail to the consumer's chosen address, because requiring more places a heavy burden on the credit provider, which is not the intention of the NCA.[244]

The SCA in *Rossouw* seemingly put an end to the controversy that surrounded the delivery of a section 129(1)(a) notice.[245] The court in this case followed the more flexible approach that was followed in *Munien*.[246] The court held that the definition of "delivered" as contained in Regulation 1 was not to be considered in the interpretation of section 129(1)(a) but, rather, that delivery of the notice should occur in accordance with section 65(2) read together with section 96 of the Act.[247] The court further held that the consumer's right to choose a preferred method of delivery points to the legislature's intention to place the risk of non-receipt in the consumer's hands.[248]

The issue of the delivery of a section 129(1)(a) notice arose once again in 2012. However, this time it was before the Constitutional Court, in the *Sebola* case. In *Sebola*, the bank (credit provider) sent the notice by registered mail to the address chosen by Mr and Mrs Sebola (the consumers).[249] However, the consumers did not receive the notice. It appeared from the post office's 'track-and-trace' system that the notice was sent to an incorrect post office.[250]

In the High Court, it was held that the credit provider need not bring the section 129(1)(a) notice to the attention of the consumer.[251] However, this decision was handed down before the *Rossouw* case was heard in the SCA.[252] The consumers were eventually granted leave to appeal by the High Court.[253] However, before a full bench of the High Court, the appeal was dismissed due to the recent judgment (at the time) in *Rossouw*.[254] The full bench held that it was not required of the credit provider to ensure that a section 129(1)(a) notice come to the actual attention of the consumer; the credit provided merely had to send the notice by registered post to the consumer's chosen address.[255]

---

[244] *Starita* par 18.11.
[245] Govender and Kelly-Louw 2018 *PER/PELJ* 13.
[246] Govender and Kelly-Louw 2018 *PER/PELJ* 13.
[247] *Rossouw* pars 21 – 30.
[248] *Rossouw* par 31.
[249] *Sebola* par 5.
[250] *Sebola* par 3.
[251] *Sebola v Standard Bank of South Africa* 2011 ZAGPJHC 229 (15 August 2011). It should be noted that this decision was handed down before the *Rossouw* case was heard by the SCA.
[252] Govender and Kelly-Louw 2018 *PELJ* 15.
[253] *Sebola* pars 10 – 11.
[254] *Sebola* par 12.
[255] *Sebola* par 14.

After the judgment in the SCA, the consumers referred the matter to the Constitutional Court.[256] The submission made to the court on appeal by the consumers was that the High Court made an error because it failed "to adopt a purposive and contextual reading of section 129".[257] The leave to appeal was granted.

Cameron J provided that section 129(1)(a) cannot be interpreted or read in isolation from the provisions of section 130.[258] The judge remarked that the credit provider's duties with regard to compliance with section 129 were contained in both sections.[259] The CC held that, while section 129 focuses on which consumer must be furnished with notice and to whom such notice must be brought, section 130 provides the credit provider with how to comply with the requirements of section 129, which is by delivery.[260]

The court further provided that, although the wording in section 129 differs from that of section 130, both require that the credit provider send a notice to the consumer.[261] The former requires the notice to be brought to the attention of the consumer, while the latter requires the notice to be delivered to the consumer before commencement of legal proceedings.[262] The court further pointed out that the credit provider is not required to "prove that the notice has actually come to the attention of the consumer since that would ordinarily be impossible".[263] The credit provider is also not required to present proof that the notice was delivered to an actual address.[264] However, the court held that, "given the high significance of the section 129 notice, it seems that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on a balance of probabilities, reached the consumer".[265] Thus, the referral to section 129 in section 130 provides more reason why these sections should not be read in isolation.[266]

Cameron J further held that both sections have the same result as aim, albeit in different ways, which is the delivery of the notice to the consumer.[267] In this regard, the court considered the meaning of "delivered" in section 130. It noted that, while the Act itself does not ascribe a

[256] "CC".
[257] *Sebola* par 17.
[258] *Sebola* pars 52 – 59.
[259] *Sebola* par 53.
[260] *Sebola* par 54.
[261] *Sebola* par 54.
[262] *Sebola* par 54. See also par 3.3.3.1.
[263] *Sebola* par 74.
[264] *Sebola* par 74.
[265] *Sebola* par 74.
[266] *Sebola* par 52.
[267] *Sebola* par 54.

meaning to "delivery", sections 65, 96, and 168 provide such meaning.[268] The court found that section 65 applies the best to section 130, because it provides that, if there is no method of delivery in a section, a document must be sent to the consumer in one of the ways prescribed in section 65(2)(a).[269] Even though registered mail is not included as one of the methods of delivery in section 65(2)(a), the court held that it is more reliable than ordinary mail, because it is difficult to prove that a consumer received a document if it was sent by ordinary mail.[270] Thus, the court held that registered mail is the preferred method of delivery, because it would provide the credit provider with proof that the notice came to the attention of the consumer.[271]

In order for the credit provider to prove that the notice reached the consumer, it would have to provide a print-out from the track-and-trace system of the South African Post Office website.[272] That way, the credit provider can easily determine if the correct post office received the notice sent by registered mail.[273] Further, the court provided that the credit provider must allege in its particulars of claim or summons that the notice was delivered to the correct post office, and that the consumer received a notification slip.[274] Should a consumer allege that no such slip was received, the court has to determine the truth of the consumer's allegation regardless of the credit provider's proven averments, which will result in the suspension of the court proceedings.[275]

The *Sebola* case appeared to settle the debate around conflicting decisions with regard to how the credit provider is required to send the section 129(1)(a) notice.[276] However, this was not the case. Two judgments handed down in two different High Courts provided conflicting decisions.[277] In both these cases, the section 129(1)(a) notice was sent by registered mail to the correct post office, but were returned because they had not been collected.[278] As a result of the conflicting judgments, credit providers were confused as to how they should send the notice and prove delivery and receipt of said notice.[279]

---

[268] *Sebola* par 61.
[269] *Sebola* par 66.
[270] *Sebola* par 68.
[271] *Sebola* par 69.
[272] *Sebola* par 76.
[273] *Sebola* par 76.
[274] *Sebola* par 77.
[275] *Sebola* pars 77 – 78.
[276] Govender and Kelly-Louw 2018 *PER/PELJ* 16.
[277] Govender and Kelly-Louw 2018 *PER/PELJ* 16.
[278] Govender and Kelly-Louw 2018 *PER/PELJ* 16
[279] Govender and Kelly-Louw 2018 *PER/PELJ* 16

In *Nedbank v Binneman,*[280] the credit provider obtained a track-and-trace record, as required in *Sebola*, to prove that a section 129(1)(a) notice had been sent by registered mail to, and reached, the correct post office.[281] However, it had been returned to the credit provider because it had remained unclaimed.[282] Thus, it appeared that, although the notice had reached the correct post office, the notice had not reached the consumer, because it was returned to the credit provider.[283] It was held that a section 129(1)(a) notice is delivered if the credit provider can merely prove that the notice had been sent to, and reached, the correct post office.[284] As such, according to Griesel J, the *Sebola* judgment had not overturned the principle laid down in *Munien* and *Rossouw* that a credit provider is not required to ensure that a consumer receives the notice and that the consumer bears the risk that comes with the chosen method of delivery.[285] The judge indicated that the *Sebola* judgment was merely a clarification that despatch, *per se*, of a section 129(1)(a) notice is not sufficient, and that it has to be proved that the notice reached the correct post office.[286] The court ultimately held that the credit provider had complied with the provisions of section 129, that is, drawing the default to the consumer's notice, and that non-receipt of the notice was the consumer's risk.[287]

However, the *Sebola* judgment was interpreted differently in *Absa Bank Ltd v Mkhize.*[288] The court in this case rejected the view in the *Binneman* case that the *Sebola* judgment did not overturn the principle adopted in *Munien* and *Rossouw*.[289] The judge held in the opposite, that the *Sebola* judgment did, in fact, overturn the principle adopted in *Munien* and *Rossouw* and, therefore, the consumer did not solely bear the risk of non-receipt.[290] The court held that it can be inferred from the majority judgment in *Sebola* that "actual notice to the consumer is the standard that *Sebola* sets".[291] The court held that the majority judgment in *Sebola* is confirmed

[280] 2012 5 SA 569 (WCC) ("*Binneman*").
[281] *Binneman* par 2.
[282] *Binneman* par 2.
[283] Govender and Kelly-Louw 2018 *PER/PELJ* 16.
[284] *Binneman* par 6.
[285] *Binneman* par 6.
[286] *Binneman* pars 4 – 6.
[287] *Binneman* par 8. This case was endorsed in *Absa Bank Ltd v Petersen* 2013 (1) SA 481 (WCC), where the judge stated: "[I]t seems to follow from the majority judgment in *Sebola* as interpreted in *Binneman* that it may be presumed when a registered item arrives at the addressee's local post office that notice of its arrival will probably have been given by the post office to the consumer and that a reasonable consumer would ensure its retrieval; ergo that non-collection of the item in the circumstances is on the face of it an indication of an unreasonable indifference by the addressee; the risk of non-receipt in the circumstances of the credit provider having taken '*reasonable measures to bring the notice to the attention of the consumer'* is on the consumer".
[288] 2012 5 SA 574 (KZD) ("*Mkhize*").
[289] *Mkhize* par 45.
[290] *Mkhize* par 58.
[291] *Mkhize* par 46.

by the fact that concrete proof of the fact that the consumer did not actually receive the notice, personally or at the chosen address, should not be ignored.[292] The court provided that the judgment in *Sebola* was not a confirmation of the judgment in *Rossouw* but, rather, that *Sebola* required proof of the fact that the notice probably reached the consumer.[293] The *Sebola* judgment, therefore, did not confirm the principle adopted in *Munien* and *Rossouw* that the consumer bears the risk of non-receipt.[294]

It was therefore held that the credit provider's duty to notify the consumer of default is not discharged if there is conclusive proof that the notice did not actually reach the consumer.[295] Thus, evidence provided by the credit provider has to prove, on a balance of probabilities, that the notice had, in fact, reached the consumer.[296] Thus, the matters were adjourned in terms of section 130(4)(b), because the consumers had not collected their respective notices.[297] The credit provider was ordered to resend the notices by registered mail and other methods, to ensure that the consumers received the notices.[298] The credit provider appealed the judgment and argued that Olsen AJ failed to interpret the *Sebola* judgment correctly.[299] On appeal, the matter was dismissed, because the SCA could not consider the credit provider's substantive part of the appeal.[300]

The court in *Balkind v Absa Bank Ltd*[301] supported the decision taken in *Mkhize*. It was held that the majority judgment in *Sebola* concluded that a section 129(1)(a) notice should come to the attention of the consumer without considering any provision in the Act that requires proof to the effect that the consumer received the notice or that it came to the consumer's attention.[302] Thus, according to the court, the credit provider has to provide proof on a balance of probabilities that the consumer received the notice.[303] It was further indicated by the court that conclusive proof that the notice did not reach the consumer may override the requirement of delivery of the notice to the correct post office.[304] Accordingly, the court held that the degree

[292] *Mkhize* par 50.
[293] *Mkhize* pars 50 – 58.
[294] *Mkhize* pars 50 – 58.
[295] *Mkhize* par 46.
[296] *Mkhize* par 56.
[297] *Mkhize* par 51.
[298] *Mkhize* par 78.
[299] *Mkhize* par 78.
[300] *Mkhize* par 78.
[301] 2013 (2) SA 486 (ECG) ("*Balkind*").
[302] *Balkind* par 35.
[303] *Balkind* pars 36 and 41.
[304] *Balkind* par 40.

of proof required in *Sebola* made way for credit providers to not properly comply with the provision of section 129(1)(a) to bring the notice to the consumer's attention.[305]

The *Mkhize* case was further supported by the court in *Standard Bank of South Africa Ltd v van Vuuren.*[306] In this case, the court held that section 129(1)(a) was not complied with if a notice was sent back to credit provider due to it being unclaimed.[307]

Unfortunately, after many attempts to resolve the issue of delivery and receipt of a section 129(1)(a) notice, the issue was still unresolved, and served yet again before the CC in *Kubyana v Standard Bank of South Africa.*[308] The court in *Kubyana* had to decide on two issues: first, what the credit provider ought to do in order to ensure that the section 129(1)(a) notice reaches the consumer and, second, the proof that the credit provider must provide in order to convince the court that it has complied with its obligations in terms of section 129 and 130 of the Act.[309]

A section 129(1)(a) notice was sent to the consumer (Mr Kubyana) by registered mail, to the address chosen by him in the agreement.[310] The track-and-trace record indicated that the notice had reached the Pretoria North post office, which was the correct post office.[311] On the same day, a notification was sent to the consumer, notifying him of an item to be collected from the post office.[312] However, the item was not collected, and the post office subsequently sent a second notification, to no avail.[313] The post office returned the unclaimed notice to the credit provider (bank).[314] The credit provider issued summons against Mr Kubyana for the cancellation of the agreement, return of the vehicle, and a claim for damages.[315] Mr Kubyana filed a special plea alleging that the credit provider had failed to comply with its obligations in terms of sections 129 and 130 of the Act.[316] The court *a quo* held that the fact that the credit provider had sent the notice by registered mail to the address chosen by Mr Kubyana in the agreement, and that it had reached the correct post office, which sent two collection notifications to Mr Kubyana, meant that the credit provider had no further obligations to

[305] *Balkind* par 47.
[306] 2013 ZAGPJHC 16 ("*Van Vuuren*").
[307] *Van Vuuren* pars 6 and 7.
[308] 2014 3 SA 56 (CC) (*"Kubyana"*).
[309] *Kubyana* par 1.
[310] *Kubyana* par 4.
[311] *Kubyana* par 5.
[312] *Kubyana* par 5.
[313] *Kubyana* par 5.
[314] *Kubyana* par 5.
[315] *Kubyana* par 6.
[316] *Kubyana* par 6.

comply with the requirement that the notice reach the consumer, nor did it have to employ additional means to ensure same.[317]

The court *a quo* subsequently held that, instead, the consumer had a duty to explain why the notice did not reach him despite the credit provider's attempts to bring such notice to the consumer's attention.[318] The matter reached the CC. Due to the significance of the *Sebola* judgment, it was important that the court consider the case, since it was evident that there were conflicting interpretations of the *Sebola* judgment.[319]

The majority judgment in *Kubyana* held that the credit provider had complied with the provisions of sections 129 and 130 of the NCA, because it proved that the notice had been sent by registered mail to the correct post office. The court further held that requiring the credit provider to do more than this would be too onerous, and would enable consumers to ignore validly sent notices with impunity.[320] The CC referred to its earlier judgment in *Sebola,* as well as the decision in the court *a quo,* and held that there is no need for the credit provider to ensure that the notice reaches the consumer personally, nor is it required of the credit provider to ensure that the notice comes to the attention of the consumer.[321] The court remarked that, if the legislature had wanted the credit provider to bring the notice to the consumer's attention, it would have expressly provided so in the Act.[322] As such, the court held that the credit provider is considered to have drawn a default to the consumer's notice by making it available to the consumer.[323]

Furthermore, the court referred to the *Sebola* judgment, and held that a postal service is regarded as a mode of delivery:

> "[W]here the notice is posted, mere despatch is not enough. This is because the risk of non-delivery by ordinary mail is too great. Registered mail in my view is essential… But the mishap that afflicted the Sebolas' notice shows that proof of registered despatch by itself is insufficient. The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer… This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office."[324]

[317] *Kubyana* pars 7 and 8.
[318] *Kubyana* par 8.
[319] *Kubyana* pars 16 and 17.
[320] *Kubyana* par 12.
[321] *Kubyana* pars 31 and 39.
[322] *Kubyana* par 31.
[323] *Kubyana* par 31. The court considered s 65(2) in this regard.
[324] *Kubyana* par 32.

The court stated that, when a consumer has chosen a preferred mode of delivery, the credit provider had a duty to respect such election, incur additional expense to ensure that the notice is sent by registered mail rather than ordinary mail, ensure that the notice was sent to and reached the correct post office, and obtain proof that the post office sent a collection notification to the consumer.[325] The court thus held that, if a credit provider complied with its obligations in terms of the Act and the consumer failed to respond to the credit provider on time, there was nothing more that the credit provider could reasonably be expected to do.[326] In this regard, the court stated the following:

> "Once a credit provider has produced a track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations inferred in the Act to effect delivery. The credit provider is, at that stage, entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached his attention if he wishes to escape the consequences of the notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of his conduct generally lies solely within his knowledge. In the absence of such an explanation, the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer' attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour."[327]

Finally, the court in *Kubyana* held that the credit provider had delivered the notice to the consumer to the satisfaction of the court.[328] This was because the consumer alleged that he did not receive the two collection notifications sent to him by the post office but failed to explain why he did not collect the notice despite the notifications from the post office.[329]

Kelly-Louw is of the opinion that *Kubyana* resolved the uncertainties presented in the *Sebola* case.[330] This is evidenced by the fact that the *Kubyana* case ultimately solved the issue of what the credit provider needs to do in order to comply with its duty to deliver a section 129(1)(a) notice in terms of the NCA.[331] Further, the court in *Kubyana* settled the issue of "uncollected"

[325] *Kubyana* pars 32, 43, and 54.
[326] *Kubyana* par 48.
[327] *Kubyana* par 53.
[328] *Kubyana* par 55.
[329] *Kubyana* par 55.
[330] Kelly-Louw Consumer Credit 272.
[331] Govender and Kelly-Louw 2018 *PER/PELJ* 22.

or "unclaimed" default notices, a matter that was not settled in *Sebola*.[332] The CC in *Kubyana* explained that the credit provider has discharged its obligation to send a section 129(1)(a) notice if it provided proof that the notice was sent to the consumer in such a way that it could be expected to have reached the consumer. Thereafter, the consumer bears the onus of proving that the notice did not come to the consumer's attention. The *Kubyana* case further confirmed that the objective approach taken by the SCA in *Rossouw* was not changed by the *Sebola* case.

3.3.3.6 Address for notification

Section 129(1)(a) does not make any provision for the address of notification. However, the definition of "delivered" in Regulation 1 makes it clear that the section 129(1)(a) notice must be delivered at the address chosen by the consumer in the credit agreement.[333] Section 96(1) of the NCA is of particular importance in this regard, as it contains provisions regarding the address of notification.[334] In terms of section 96(1), when a party is required or wishes to give legal notice to another party as contemplated in the credit agreement, the NCA, or any other law, such notice must be delivered at the address chosen by the consumer in the credit agreement, or at the consumer's recently provided address.[335] Van Heerden submits that a section 129(1)(a) notice may qualify as a legal notice because it is a notice that is given in anticipation of possible legal enforcement proceedings.[336]

The court in *Nedbank v Vermeulen*[337] held that, if sending a notice by registered mail equates to compliance with section 129(1)(a), it seems that is only true if the notice is sent to the correct address.[338] The court in *Prochaska* further held that a credit provider is considered to have fully complied with the provisions of section 129(1)(a) if a notice was sent to the correct address as chosen by the consumer in the credit agreement.[339]

In *Greeff v Firstrand Bank Ltd*,[340] the court held that sending a section 129(1)(a) notice by registered mail cannot constitute service for purposes of the credit agreement, because the parties clearly intended the possibility of choosing different addresses for the method of

[332] Govender and Kelly-Louw 2018 *PER/PELJ* 22.
[333] Van Heerden and Boraine 2011 *SA Merc LJ* 50.
[334] S 96(1). See van Heerden *Guide* Enforcement par 12.4.5.
[335] S 96(1). See van Heerden *Guide* Enforcement par 12.4.5. See also Van Heerden and Boraine 2011 *SA Merc LJ* 50.
[336] Van Heerden *Guide* Enforcement par 12.4.5. See also Van Heerden and Boraine 2011 *SA Merc LJ* 50.
[337] 2009 JOL 24492 (ECG) ("*Vermeulen*").
[338] *Vermeulen* par 11.
[339] *Prochaska* par 55.
[340] 2012 3 SA 157 (NCK) ("*Greeff*").

posting, on the one hand, and the method of service, on the other.[341] The court held that not adhering to the consumer's chosen address means that the credit provider bears the risk of non-compliance and the burden of proving that the notice reached the consumer.[342]

In this regard, Van Heerden and Boraine submit that, although the NCA fails to provide that the address chosen in the credit agreement constitutes the *domicilium citandi et executandi*, the practical effect of section 96 is that the address chosen by the consumer will serve as that address.[343] However, in *FFS Finance South Africa (FT) Ltd t/a Ford Credit v Janse van Rensburg*,[344] the consumer raised the defence that the credit provider did not deliver the section 129 notice at the consumer's preferred address. The court, however, held that the consumer did not deny that it was his address, and concluded that the address was, therefore, the consumer's preferred address.

3.3.3.7 Change of address

A consumer must choose a preferred address to which legal notices are to be sent.[345] It is clear that a change of address can create problems.[346] In terms of section 96(2) of the Act, a party to a credit agreement may change such address by delivering a written notice indicating the new address to the other party, by hand, registered mail, or email.[347] Van Heerden submits that a consumer is thus not considered to have effectively changed said address if notice of such change is not sent in accordance with section 96(2), and such new address therefore cannot replace the address chosen in the credit agreement as the address to which a notice should be delivered.[348]

In *Qubeka v Firstrand Bank Ltd t/a Wesbank: In re Firstrand Bank Ltd t/a Wesbank v Qubeka*,[349] the consumer changed his address and contended that the credit provider had served the section 129 notice to an incorrect residential address.[350] He alleged that he had sent a notification of a change of address to the bank via email when he applied for additional credit, and that he had attached proof of residence to said email.[351] However, the court rejected the

[341] *Greeff* par 43.
[342] *Greeff* par 44.
[343] Van Heerden and Boraine 2011 *SA Merc LJ* 51.
[344] 2021 ZAF SHC 350 ("*Janse van Rensburg*".
[345] Par 3.3.3.6.
[346] Van Heerden *Guide* Enforcement par 12.4.6.
[347] S 96(2).
[348] Van Heerden *Guide* Enforcement par 12.4.6.
[349] 2021 ZAGPJHC 658 ("*Qubeka*").
[350] *Qubeka* par 5.
[351] *Qubeka* par 8.

consumer's allegation, and held that the consumer's allegation was not *bona fide*, and that he lacked the evidence that would qualify as a defence at trial.[352]

The court in *Absa Bank Ltd v Brown*[353] held that a notice to change an address must be sent with the intention to change the address chosen in the credit agreement and substitute it with a new address to be mentioned in the credit agreement.[354] The court in *Balkind*, on the other hand, held that, even if the notice was sent to the correct post office, it cannot be said that such notice reached the consumer's address, unless the consumer deliberately avoided receipt of the notice.[355]

However, van Heerden submits that the correct view was adopted in *Robertson v Firstrand Bank Ltd*,[356] where the court held that the consumer had failed to notify the credit provider of her change of address, and that the credit provider was entitled to deliver the notice to the address initially chosen by the consumer in the credit agreement.[357] Van Heerden further submits that a consumer need not personally send a notice changing the address, and that another person, such as a debt counsellor, may send such notice on the consumer's behalf.[358]

Therefore, a change of the consumer's address must be effected by sending a written notice to the credit provider to notify it of such change. Failure to send such notice, or to send it in accordance with the provisions of section 96(2), will result in the consumer's address not being changed for purposes of the credit agreement.

3.4 National Credit Amendment Act 19 of 2014

After the CC handed down the *Sebola* judgment, the legislature made amendments to certain aspects of section 129 of the NCA by means of the National Credit Amendment Act.[359]

[352] *Qubeka* par 12.
[353] 2015 ZAECGHC 7 ("*Brown*").
[354] See *Mercedes Benz Financial Services v Mahomed* [2014] ZAGPPHC 978 at par 8.
[355] *Balkind* par 63.
[356] 2015 ZACGHC 7 ("*Robertson*").
[357] *Robertson* par 34.
[358] Van Heerden *Guide* Enforcement par 12.4.6. See also *Firstrand Bank Ltd v Oberholster* 2018 ZAGPPHC 522.
[359] Act 19 of 2014.

3.4.1 The amended section 129 notice

The President signed the National Credit Amendment Act on 16 May 2014;[360] however, it only came into effect on 13 March 2015.[361] The legislature amended section 129 of the NCA by adding three subsections to it. The subsections provide as follows:[362]

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

The *Sebola* judgment was the prevailing authority at the time of drafting the three subsections,[363] and influenced the manner in which these subsections were drafted.[364] Govender and Kelly-Louw remark that the subsections clarify the issue of delivery of a section 129(1)(a) notice before the credit provider can institute legal proceedings.[365] They also remark that the consumer's knowledge is not a requirement when a section 129(1)(a) notice is delivered.[366] Therefore, the credit provider is not required to prove that the notice came to the actual attention of the consumer.[367]

While the new subsections provide clarity on issues concerning the delivery of a section 129(1)(a) notice, there remains some unresolved issues.[368] The court in *Standard Bank of South Africa Ltd v Matse*[369] had to consider whether a credit provider may deviate from the prescribed methods of delivery in terms of section 129(5).[370] In this case, the address chosen by the consumer appeared to be non-existent.[371] As such, the court remarked that there cannot be effective delivery at such an address, and that there cannot be adult person at such an address

[360] GN 389 in *GG* 37665 of 19 May 2014 ("NCA Amendment Act 2014").
[361] Govender and Kelly-Louw 2018 *PER/PELJ* 23.
[362] S 32 of the NCA Amendment Act 2014.
[363] Govender and Kelly-Louw 2018 *PER/PELJ* 23.
[364] Govender and Kelly-Louw 2018 *PER/PELJ* 23.
[365] Govender and Kelly-Louw 2018 *PER/PELJ* 23.
[366] Govender and Kelly-Louw 2018 *PER/PELJ* 23.
[367] Govender and Kelly-Louw 2018 *PER/PELJ* 24.
[368] Govender and Kelly-Louw 2018 *PER/PELJ* 24.
[369] 2020 ZAGPJHC 221 ("*Matse*").
[370] *Matse* par 3.
[371] *Matse* par 4.

to whom the notice can be delivered.[372] The court stated that the provisions of section 129(5) thus do not apply in this instance.[373] Consequently, the court regarded the chosen address to be fatally defective for purposes of section 129(5).[374] However, the court granted leave to appeal, provided that the credit provider deliver the section 129 notice at the property where the consumer resided and by email, thereby allowing the consumer 30 days in which to respond to the notice.[375] It is evident in this instance that, although the legislature provided the prescribed methods of delivery, it omitted to account for a situation where the credit provider may not be able to reach the consumer for reasons that include defective or non-existent addresses designated by consumers.[376]

Govender and Kelly-Louw state that the NCA Amendment Act 2014 fails to mention a situation where the credit provider has delivered the section 129(1)(a) notice in accordance with the NCA and such notice reaches the correct post office, which then notifies the consumer to collect the letter, but the consumer neglects to do so.[377] The *Kubyana* judgment was delivered after the NCA Amendment Act 2014 had been drafted, and the legislature therefore could not take the judgement into consideration at the time of drafting the amendments.[378] As mentioned above, it was held in the *Kubyana* case that the credit provider need not prove anything further if it complied with all its obligations in terms of section 129(1).[379] As such, the consumer would have to prove that the notice had not come to the consumer's attention.[380] However, Govender and Kelly-Louw submit that the omission of an explicit provision dealing with such situations could create interpretational problems, such as an assumption that proof of receipt by the correct post office will suffice as proof of compliance, despite indications that the consumer did not receive the notice.[381] In this regard, it is submitted that the *Kubyana* judgment still governs the situation of uncollected notices by consumers.[382]

[372] *Matse* par 19.
[373] *Matse* par 20.
[374] *Matse* par 21.
[375] *Matse* par 21.
[376] *Matse* par 20.
[377] Govender and Kelly-Louw 2018 *PER/PELJ* 24.
[378] Govender and Kelly-Louw 2018 *PER/PELJ* 24.
[379] Par 3.3.3 5.
[380] Par 3.3.3 5.
[381] Govender and Kelly-Louw 2018 *PER/PELJ* 24.
[382] Govender and Kelly-Louw 2018 *PER/PELJ* 24.

3.5 Preliminary remarks

The ALA and the NCA constitute the consumer credit legislation currently effective in South Africa. The ALA, together with the NCA, primarily regulate "contracts for the purchase of land on instalments".[383] The ALA's debt enforcement notice is provided for in Chapter II of the Act, which applies to contracts for the alienation of land, if the land is used or is intended to be used for residential purposes, and if the purchase price is payable in three or more instalments over a period exceeding one year. It is possible for a contract to be subject to both the ALA and the NCA. In terms of Schedule 1 to the NCA, the NCA will prevail in instances of conflict between the pieces of legislation. However, the CC in *Amardien* held that a conflict should not arise between the provisions of section 19 and 129(1)(a), because the notices serve different purposes.

In terms of section 19 of the ALA, the notice is required to enforce specified remedies, such as acceleration clauses and claims for damages. However, it is not required to institute a claim for specific performance.

In terms of section 19, the purchaser must be notified of the breach of contract, and the letter must demand that the breach of contract be rectified. The letter must be handed to the purchaser or sent by registered post. Section 19 is prescriptive regarding the content of the notice: it must (a) provide detail of the breach; (b) demand that the breach be rectified; and (c) indicate the steps the seller intends to take if the breach of contract is not rectified.

The question as to the effects of non-receipt of the notice and the notice's effectiveness should it not come to the purchaser's attention is yet to be answered with certainty by the courts, evident in the divergent views in this regard.

The NCA has a wide field of application and, for instance, no longer contains a limit on the amount up to which it provides protection. The Act basically applies to all credit agreements where there is deferral of payment and in terms whereof fees, charges, or interest is charged. This is commendable, as more credit consumers than ever before enjoy protection against potentially dangerous types of agreements.

The NCA, similar to its predecessors, and the ALA contain debt enforcement provisions. Section 129(1)(a) provides that the consumer's default must be drawn to the consumer's notice in writing, without providing the method to achieve this. However, section 130(1)(a) assists by

[383] Renke thesis par 6 1.

providing that the notice must be "delivered". The legislature, however, failed to define "delivered", which caused the courts, having to interpret the NCA's provisions, or at least some of them, to grasp at the definition of "delivered" in the Credit Regs. However, the courts found the best assistance with regard to delivery in section 65(2).

The NCA's notice provisions also had to be interpreted by the courts, to attempt to find answers and, in terms of section 2(1), to interpret the Act in line with its objectives as set out in section 3. The issues regarding the delivery of the section 129(1)(a) notice and the extent to which the notice must be brought to the defaulting consumer's attention were eventually decided by the SCA in *Rossouw* and, after that, also by the CC in *Sebola* and *Kubyana*. The CC in *Kubyana* had to revisit its own previous decision in *Sebola* to provide clarity on these issues. Although ordinary mail is provided for as a method of delivery in section 65(2), the CC made it clear that credit providers must incur the extra expense and send the section 129 notice per registered mail. This is a safer option, because of the post office being able to provide proof of delivery to the correct branch.

The NCA was amended shortly thereafter, in 2015, by the insertion of section 129(5) to (7). These new subsections provide for two modes of delivery of the notice: by hand to an adult person at the consumer's designated address, or by means of registered mail. The consumer must select the mode of delivery in the credit agreement, and even thereafter. Section 129(7) provides what will be deemed proof of delivery, depending on the type of delivery.

Kubyana is a well-balanced decision, aimed at ensuring the promotion of equity between the rights and obligations of credit providers and consumers: the credit provider must ensure that the notice is sent to the correct branch of the post office and submit proof in that respect. The onus then shifts to the consumer, who must act reasonably and collect the notice from the post office. However, if the consumer can indicate good reasons for the failure to collect the notice, the consumer will be accommodated by the court by an adjournment of the proceedings to allow the credit provider the opportunity to comply with the provisions of section 129.

As far as the contents of the section 129(1)(a) notice is concerned, the NCA is less prescriptive than its predecessors. In terms of the NCA, the default must be drawn to the consumer's notice, and proposals must be made that the consumer approach, for instance, a debt counsellor or an alternative dispute-resolution agent, to attempt to resolve any dispute with the credit provider, or to create and agree on a plan with the credit provider to bring the arrears in terms of the credit agreement up to date.

CHAPTER 4

CONCLUDING REMARKS AND RECOMMENDATIONS

The purpose of the dissertation was to compare the debt enforcement notice in terms of the NCA, the consumer credit enactment currently effective in South Africa, with the debt enforcement notices in terms of the Act's predecessors, the Hire-Purchase Act and the Credit Agreements Act. The purpose was also to compare the NCA's notice with that in terms of the ALA, which applies concurrently with the NCA to the alienation of land contracts in instalments. The ultimate aim was to determine if any lessons could be learned from the NCA's predecessors, and/or the ALA, in respect of debt enforcement notices.[384] This particularly applies to the question whether the section 129(1)(a) debt enforcement notice in terms of the NCA must reach the consumer in order to be effective.

The position in terms of section 12(b) of the Hire-Purchase Act, as amended in 1965, and in terms of section 11 of the successor to the Hire-Purchase Act, the Credit Agreements Act, was summarised above.[385] The same holds for the debt enforcement notices in terms of the ALA and the NCA.[386]

Section 12(b) of the Hire-Purchase Act as amended referred to "made a demand"[387] and section 11 of the Credit Agreements Act provided that the consumer must be "notified"[388] of the breach of contract before debt enforcement could take place.

The section 12(b) provisions gave rise to conflicting judgments in respect of the question whether the notice had to reach the consumer in order to be effective. In *Weinbren*, decided on section 12 of the Hire-Purchase Act before its 1965 amendment, the court held that the notice must reach the consumer to be effective, in other words the consumer must be personally made aware of the notice.[389] However, the approach by the court in *Fitzgerald*, decided after the 1965 amendment, was that the amendment signified a change in the legislature's intention and that the notice did not have to reach the credit receiver to be effective.[390]

---

[384] Pars 1.1 – 1.4.
[385] Par 2.3.3.
[386] Par 3.5.
[387] Par 2.2.2.1.
[388] Par 2.3.2.
[389] Par 2.2.2.1.
[390] Par 2.2 2 1.

Section 11 of the Credit Agreements Act required that the credit receiver had to be notified of the default before debt enforcement in terms of that Act could take place. Writers' opinions differed whether the notice actually had to reach the consumer. However, the court in *Marques* distinguished between "notify" and "inform". If the consumer has to be informed of the default, the information must reach the consumer, which is not the case where the consumer must be notified. The judge in *Marques* based his decision on the literal wording of section 11 and held that it was not required that the notice must reach the consumer to be effective.[391]

Section 19 of the ALA provides that the purchaser must be notified of the default and prescribes the methods of the notice's delivery. However, the question as to the effects of non-receipt of the notice and the notice's effectiveness should it not come to the purchaser's attention is yet to be answered with certainty by the courts, evidenced by the divergent views in this regard.[392]

The NCA does not constitute an example of clear legislative drafting. This was remarked on at least two occasions by the SCA.[393] The same holds for the notice provisions in section 129(1)(a) and (b) in the NCA, read with section 130(1). The legislature, for instance, used the word "may" in section 129(1)(a), which creates the impression that notice is not a requirement, but then makes it clear in section 129(1)(b) that notice is compulsory. Be that as it may, section 129(1)(a) provides that the consumer's default must be drawn to the consumer's attention in writing. The legislature fails in section 129(1)(a) and (b) to provide how the notice and default should be brought to the consumer's attention, but then, once again, in a later section, section 130(1)(a), states that the notice must be "delivered". However, not unsurprisingly, the drafters of the NCA omitted a definition of "delivered" and "delivery", which gave rise to different interpretations of the Act by the courts over a number of years. Eventually, the NCA was amended in terms of the NCA Amendment Act 2014.

However, the amendments to section 129 by the insertion of section 129(5) to (7) merely brought the NCA on par with its predecessors by providing for methods of notification, namely in person or per registered mail. The NCA subsequently goes further than its predecessors by also providing what constitutes proof of hand delivery or dispatch per registered mail.

The section 129(1)(a) notice in terms of the NCA gave rise to quite a number of High Court decisions, *inter alia* regarding the delivery of the notice and when it will be effective. These

[391] Par 2.3.2.
[392] Pars 3.2.3 and 3.5.
[393] *Nedbank* par 2; *Du Bruyn N.O. v Karsten* 2019 (1) SA 403 (SCA) par 1.

decisions culminated in the SCA decision in *Rossouw*. The SCA held that compliance with the delivery provisions in the NCA is required, whereupon the consumer carries the risk for the not-receipt of the notice.[394] The CC in *Sebola* next had the opportunity to clarify the NCA debt enforcement provisions, but instead of providing clarity, the CC's decision caused the High Courts to follow divergent directions.[395]

In *Kubyana*[396] the CC had to clarify the same court's decision in *Sebola*. The court in *Kubyana* had to decide two issues, namely what the credit provider ought to do in order to ensure that the section 129(1)(a) notice reaches the consumer and, the proof that the credit provider must provide in order to convince the court that it has complied with its obligations in terms of section 129 and 130 of the Act.

The majority judgment in *Kubyana* held that proof by the credit provider that the notice had been sent by registered mail to the correct post office, constitutes compliance with the provisions of sections 129 and 130 of the NCA. Requiring more than this is too onerous, and consumers should not be enabled to ignore validly sent notices with impunity. The CC in *Kubyana* held that the credit provider does not have to ensure that the notice reaches the consumer personally. Credit providers are not required to ensure that the notice comes to the attention of the consumer. If this is what the legislature had wanted, it would have expressly provided so in the Act. The credit provider complies with the Act and have drawn the default to the consumer's attention if the credit provider has made the notice available to the consumer.[397] Section 129 notices must be dispatched by registered mail, and not ordinary mail.[398] The credit provider must ensure that the notice was sent to and reached the correct post office and must submit proof that the post office sent a notification to the consumer to collect the registered mail. There is nothing more the credit provider could reasonably be expected to do.[399] The credit provider will have shown "that it has discharged its obligations in the Act to effect delivery". The onus is then on the consumer to "explain why it is not reasonable to expect the notice to have reached his attention if he wishes to escape the consequences of the notice".[400]

[394] Par 3.3.3.
[395] Par 3.3.3.
[396] See par 3.3.3.
[397] Par 3.3.3.
[398] Par 3.3.3.
[399] Par 3.3.3.
[400] Par 3.3.3.

Section 129(5) and (7) do not provide for the instance where a consumer failed to collect the notice from the post office, despite proof of delivery to the correct branch of the post office by the credit provider. It also does not provide for the case of an attempted hand delivery where the adult person at the consumer's designated address refuses to accept delivery of the notice.[401]

What lessons could be learned from the NCA's predecessors and the notice provisions in the ALA? I submit the lessons are as follows: The wording of the debt enforcement notice provisions in a particular Act is important and must be drafted with care. The legislature must make its intention clear. How must the notice be brought to the consumer's attention; must it reach the consumer to be effective? However, the provisions in the different Acts, and the interpretation of these provisions by the courts over the years, indicate that it is not possible for the legislature to provide for each and every possibility that may occur in practice. As long as the NCA remains effective as the primary consumer credit enactment, it is reassuring that the pragmatic approach by our highest court in *Kubyana* is in place to assist our courts, should the amended section 129 fail to provide the answer.

[401] Par 3.4.1.

BIBLIOGRAPHY

Books

Belcher CI (ed) *Norman's purchase and sale in South Africa* 4th ed (1972) Butterworth: Durban

Campbell-Salmon E *Hire-purchase and credit sales law and practice* (1962) Pitman: London

De Jager T *Credit agreements and finance charges* 1st ed (1981) Juta: Cape Town

Diemont MA, Marais RM & Aronstam PJ *The law of hire-purchase in South Africa* 4th ed (1978) Juta: Cape Town

Diemont MA & Aronstam PJ *The law of credit agreements and hire-purchase in South Africa* 5th ed (1982) Juta: Cape Town

Flemming HCJ *Krediettransaksies* (1982) Butterworth: Durban

Grove & Otto *Basic principles of consumer credit law* (2002) Juta: Cape Town

Hahlo HR & Kahn E *The South African legal system and its background* (1973) Juta: Cape Town

Kelly-Louw M & Stoop J *Consumer credit regulation in South Africa* (2012) Juta: Cape Town

Kelly-Louw M *Alienation of Land Act LAWSA* (2014) LexisNexis: Durban

Nagel CJ (ed) *Commercial law* (2015) LexisNexis: Durban

Otto JM "Introduction and historical background to the National Credit Act" in Scholtz ed *Guide to the National Credit Act* (2008) LexisNexis: Durban

Otto JM (ed) "Commentary" *Credit law service et seq* (1991) with updates (last update: 2010) LexisNexis: Durban

Otto JM and Otto R-L *The National Credit Act explained* 4th ed (2015) LexisNexis: Durban

Scholtz JW (ed) "Commentary" *Guide to the National Credit Act et seq* (2008) with updates (last update: 2022) LexisNexis: Durban

Van Heerden C "Enforcement of credit agreements" in Scholtz (ed) *Guide to the National Credit Act* (2008) LexisNexis: Durban

Case Law

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

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

Absa v De Villiers 2009 (5) SA 40 (C)

Absa v Petersen 2012 (4) All SA 642 (WCC)

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

Balkind v Absa Bank Ltd 2013 (2) SA 486 (ECG)

BMW Financial Services (SA) (Pty) Ltd v Forefront Trading CC and Another unreported case number 12331/09 (KZD) decided on 17 March 2010

Bowmaker (C.A.) (Pvt) Ltd v Wood N.O. 1959 (1) SA 766

Denton v Haldon's Furnishers (Pty) Ltd 1951 (1) SA 720 (T)

FFS Finance South Africa (RF) (Pty) Ltd t/a Ford Credit v Janse van Rensburg 2021 ZAF SHC 350

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

Firstrand Bank Ltd v Oberholster 2018 ZAGPPHC 522

Fitzgerald v Western Agencies 1968 (1) All SA 366 (T)

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

Holme v Bardsley 184 (1) SA 429 (W)

Kubyana v Standard Bank of South Africa 2013 (3) SA 56 (CC)

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

Marimuthu Munien v BMW Financial Services unreported case number 16103/08 (KZD)

Marques v Unibank Ltd 2001 (1) SA 145 (W)

Mercedes Benz Financial Services v Mahomed [2014] ZAGPPHC 978

National Motors v Fall 1958 (2) SA 570

Nedbank v Binneman 2012 (5) SA 569 (WCC)

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

Nedbank v Vermeulen 2009 JOL 24492 (ECG)

Ntwendala v Nedbank Ltd 2014 ZAECLLC 2

Qubeka v Firstrand Bank Ltd t/a Wesbank: In re Firstrand Bank Ltd t/a Wesbank v Qubeka 2021 ZAGPJHC 658

Robertson v Firstrand Bank Ltd t/a 2015 ZACGHC

Rossouw v Firstrand Bank 2010 (6) SA 439 (SCA)

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

Sette v D.H. Saker (Pty) Ltd 1957 (2) SA 87 (W)

Smit and Venter v Fourie and Others 1946 W L D

Standard Bank of South Africa v Bekker 2011 (6) SA 252 (GSJ)

Standard Bank of South Africa Ltd v Matse; In re: Standard Bank of South Africa Ltd v Matse 2020 ZAGPJHC 221

Standard Bank of South Africa v Van Vuuren 2013 ZAGPJHC

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

Weinbren v Michaelides 1957 (2) All SA 100 (W)

Journal Articles

Boraine A and Renke S "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part I)" 2007 *De Jure*

Govender S and Kelly-Louw M "Delivery of the compulsory section 129(1) notice as required by the National Credit Act of 2005" 2018 *PELJ*

Kelly-Louw M "The default notice as required by the National Credit Act 34 of 2005 (Part 2)" 2010 *SA Merc LJ*

Otto JM "Notices in terms of the National Credit Act: Wholesale national confusion — Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors; Munien v BMW Financial Services; Starita v Absa Bank Ltd; Firstrand Bank v Dhlamini" 2010 *SA Merc LJ*

Otto J "The history of consumer credit legislation in South Africa" 2010 *Fundamina*

Renke S, Roestoff M and Haupt F "The National Credit Act: New parameters for the granting of credit in South Africa" 2007 *Obiter*

Taylor H "Enforcement of debt in terms of the National Credit Act 34 of 2005, trial and celebration? A critical evaluation" 2009 *De Jure*

Van Heerden CM and Boraine A "The conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act" 2011 *SA Merc LJ*

Van Heerden CM and Coetzee H "Marimuthu Munien v BMW Financial Services (SA) (PTY) LTD Unreported Case No. 16103.08 (KZN)" 2009 *PER*

Van Heerden CM and Otto JM "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR*

Legislation

Alienation of Land Act 68 of 1981

Credit Agreements Act 75 of 1980

Development Facilitation Act 67 of 1995

Hire Purchase Act 36 of 1942

Hire Purchase Amendment Act 30 of 1965

National Credit Act 34 of 2005

National Credit Amendment Act 19 of 2014

National Credit Amendment Act 7 of 2019

Sale of Land on Instalments Act 72 of 1971

Government Gazettes

Government Gazette 37665 GN 389 of 19 May 2014

Government Gazette 8344 GN R148 of 20 August 1982

Government Gazette 8918 GN R148 of 07 October 1983

Government Gazette 11304 R946 of 05 May 1988

Reports

Department of Trade and Industry South Africa "Consumer credit law reform: Policy Framework for consumer credit*"* 2004

South African Law Commission *Working paper 46 Project 67* "The Usury Act and related matters" 1993

Theses and Dissertations

Renke S "An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005" (2012) LLD thesis University of Pretoria

Websites

https://www.ncr.org.za

https://journals.co.za/doi/pdf/10.10520/AJA025003329_4144