



**The section 129(1)(a) notice in terms of the National Credit Act 34 of 2005
and the Constitution**

by

**Kagisho Eric Letlhogonolo Madumo
18304002**

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Supervisor: Prof S Renke

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Summary

Section 129(1)(a), read in conjunction with section 130(1)(a) of the National Credit Act 34 of 2005 (“NCA”), imposes a requirement on a credit provider to deliver a notice that brings a default in terms of a credit agreement to the notice of the consumer prior to instituting legal proceedings to enforce the agreement. Previously, there was uncertainty with regard to what constitutes delivery of a section 129(1)(a) notice by a credit provider, as section 129 of the NCA did not prescribe a method of delivery, and the courts thus had to determine what constituted delivery. The issue was determined on two occasions by the Constitutional Court (“CC”), with the second occasion clarifying the legal position taken by the CC in the first occasion. Consequently, the legislature amended section 129 of the NCA to prescribe a method of delivery. This dissertation interrogates the notice in terms of section 129(1)(a) of the NCA and its interpretation with reference to the Constitution of the Republic of South Africa, 1996, and recommends steps for credit providers to comply with the requirements of such notice.

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Introduction

This dissertation investigates the section 129(1)(a) debt-enforcement notice in terms of the National Credit Act¹ and the requirement that a credit provider deliver such notice to a consumer who is in default in relation to a credit agreement subject to the Act prior to debt enforcement. The investigation is done with reference to the Constitution of the Republic of South Africa, 1996,² and selected rights contained in Chapter 2 of the Constitution, the Bill of Rights.

In March 2006, the NCA, the consumer credit enactment presently effective in South Africa, was assented to, and it became fully effective at the beginning of June 2007.³ This was in following the Department of Trade and Industry's Policy Framework that indicated the need for reform of South Africa's credit market.⁴ The NCA repealed and replaced⁵ the Integration of Usury Laws Act,⁶ the Credit Agreements Act⁷, and the Usury Act.⁸ The Act further amended and, to a limited extent, repealed 15 other pieces of legislation.⁹ Since coming into effect, the National Credit Amendment Act of 2014¹⁰ amended the NCA in material respects "to address implementation challenges that have materialised during the implementation of the Act and

¹ Act 34 of 2005 ("NCA" or "Act"). All references to sections and regulations hereinafter will be in accordance with the NCA, unless indicated otherwise.

² "Constitution".

³ Proc 22 2006 in GG 28824 of 2006-05-09. A number of sections in the NCA became effective on 1 June 2006 and 1 September 2006. See Scholtz "The implementation, objects and interpretation of the Act" in Scholtz (ed) *Guide to the National Credit Act* (2008), "Scholtz ch 2" par 2.2 for the implementation of the NCA.

⁴ The Department of Trade and Industry South Africa *Consumer credit law reform: Policy framework for consumer credit August 2004*, "Policy framework". See also Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* LLD thesis UP 2012 ("Renke thesis") par 8 2.2.

⁵ S 172(4); Scholtz ch 2 par 2.1.

⁶ Act 57 of 1996.

⁷ Act 75 of 1980 ("Credit Agreements Act").

⁸ Act 73 of 1968 ("Usury Act").

⁹ See s 172(2) read with Sch 2; Scholtz ch 2 par 2.1.

¹⁰ Act 19 of 2014 ("2014 NCA Amendment Act"). The 2014 NCA Amendment Act was assented to on 16 May 2014 and came into effect on 13 March 2015. See Scholtz ch 2 par 2.2.

also to make some improvements”.¹¹ Further amendments to the NCA would come into effect in terms of the National Credit Amendment Act of 2019.¹²

Section 3 sets out the purposes of the NCA, which are “to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers”.¹³ These aims are supported by a number of sub-objectives.¹⁴ Examples of these are: to promote the development of a credit market that is accessible to all South Africans, with heightened emphasis on persons who were historically excluded from accessing credit in a manner that is sustainable, the encouragement of responsible borrowing, “avoidance of over-indebtedness”,¹⁵ and the promotion of “equity in the credit market by balancing the respective rights and responsibilities” of the parties to a credit agreement, namely the credit provider and the consumer.¹⁶ Sub-objectives that stand out for purposes of my dissertation are the provision of “a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all consumer obligations under credit agreements”.¹⁷ This sub-objective links debt review in terms of section 86 and debt enforcement in terms of Part C of Chapter 6. A related sub-objective is to discourage credit providers recklessly granting credit to consumers.¹⁸

The NCA is not the first consumer credit enactment that addresses debt enforcement by credit providers and protects consumers in this regard. The Hire-Purchase Act¹⁹ and the Credit Agreements Act, in sections 12 and 11 respectively, contained debt-enforcement notices. The aim of these notices was to compel a credit grantor to send a written notice of warning to a credit receiver that the credit receiver was in default and that legal proceedings would be

¹¹ Scholtz ch 2 par 2.2.

¹² Act 7 of 2019 (“2019 NCA Amendment Act”). This Act provides for debt intervention, an alternative to debt review, a debt alleviation process introduced in the original NCA. The aim is to make debt alleviation accessible to low- or no-income consumers. The 2019 NCA Amendment Act, which was signed into law, must still be put into operation. See Scholtz ch 2 par 2.2.

¹³ The introduction to s 3.

¹⁴ S 3(a) – (i).

¹⁵ S 3(i).

¹⁶ S 3(d).

¹⁷ S 3(i).

¹⁸ S 3(c)(ii).

¹⁹ Act 36 of 1942. The Hire-Purchase Act preceded the Credit Agreements Act, and was the first consumer credit Act in SA that regulated the contractual aspects of hire-purchase or instalment agreements. The Hire-Purchase Act was amended substantially by the Hire-Purchase Amendment Act 30 of 1965. See Otto and Renke “Introduction and historical background” in Scholtz (ed) *Guide to the National Credit Act* (2008) (“Scholtz ch 1”) par 1.3.2.

instituted against the credit receiver if the default was not rectified within a time specified in the notice. Both Acts provided for minimum notice periods and the methods of delivery of the notices. However, a contentious issue in terms of both Acts was whether the debt-enforcement notice had to reach and come to the attention of the credit receiver in order to be effective.²⁰

The NCA continued the tradition in South African credit legislation to require a debt-enforcement warning notice to the consumer by the credit provider before debt enforcement may take place.²¹ This notice is provided for in section 129(1)(a) of the Act. Debt enforcement means to approach a court to request the enforcement of the credit provider's remedies in terms of the common law or the credit agreement with the particular consumer. The section 129(1)(a) notice also compels the credit provider to recommend to the consumer in the section 129(1)(a) notice to seek assistance from a debt counsellor or other parties or institutions mentioned in section 129(1), with two possible purposes in mind. The first is to resolve any dispute that may exist between the credit provider and the consumer in terms of their credit agreement, and the second is to create and agree on a plan to bring up to date any instalments that are in arrears.

One of the problems with the section 129(1)(a) notice in terms of the original NCA is that the legislature did not specify how this notice should be brought to the consumer's attention. Section 130(1)(a), which, as a result of section 129(1)(b), must be read with section 129(1)(a), refers to "delivered". However, the meaning of "delivered" was not defined in the original NCA. This gave rise to a number of court decisions in attempts to determine how the debt-enforcement notice must be brought to the consumer's attention. This resulted in a decision by the Supreme Court of Appeal ("SCA") and, eventually, decisions in two Constitutional Court ("CC") cases. It is believed that, as a result of the decisions by the CC, the NCA was amended in terms of the 2014 NCA Amendment Act, which inserted three subsections into section 129. Section 129(5) to (7) now provides the manner in which the fact that a particular consumer is in default must be brought to the consumer's attention and what constitutes proof of delivery.

Scholtz²², *inter alia*, wrote and updated chapter 2 in the *Guide to the National Credit Act*. In paragraph 2.5, titled "The National Credit Act and the Constitution", Scholtz makes the

²⁰ See Grové and Otto *Basic principles of consumer credit law* 2002 41ff and Govender and Kelly-Louw "Delivery of the compulsory section 129(1) notice as required by the National Credit Act of 2005" 2018 21 *PER/PELJ* par 2.

²¹ See Van Heerden "Enforcement of credit agreements" in Scholtz (ed) *Guide to the National Credit Act* 2008 par 12.4 ("Scholtz ch 12"), and Govender and Kelly-Louw 2018 21 *PER/PELJ* pars 4 and 5.

²² Scholtz ch 2 par 2.5.

following remark with reference to the NCA’s objectives as provided for in section 3, discussed above:

“Given the clear socio-economic aims of the National Credit Act it is not surprising that its provisions would be tested against and interpreted in the light of the Constitution. The rights to equality (section 9) and property (section 25) feature most prominently in constitutional challenges.”

Section 129(1)(a) of the NCA, read with section 130(1) and other related provisions in the Act, such as section 65, titled “Right to receive documents”, were “tested against and interpreted in the light of the Constitution”. A number of divergent High Court decisions regarding “delivery” of a section 129(1)(a) notice and whether only actual receipt thereof would constitute compliance with the provisions of section 129, read with section 130, gave rise to the SCA decision in *Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans (Formerly First Rand Bank of South Africa Ltd)*.²³ Two years later, the CC delivered a judgment in this regard, in *Sebola and Another v Standard Bank of South Africa and Another*.²⁴

The *Sebola* decision caused two main streams of thought regarding the delivery and, in particular, the requirement of receipt of a section 129 notice in the High Courts, which caused the CC to revisit its own decision in *Sebola*. This happened nearly two years after *Sebola*, in *Kubyana v Standard Bank of South Africa Ltd*.²⁵ On 13 March 2015, the 2014 NCA Amendment Act amended the NCA through the insertion of section 129(5) to (7). Section 129 as amended was then, naturally, subjected to judicial scrutiny in the years since the 2015 amendment. The extent of protection afforded by consumer credit protection legislation is determined by its field of application. The same holds for protection in respect of debt enforcement in terms of the NCA. In brief, in terms of section 4(1), the NCA applies²⁶ to credit

²³ 2010 (6) SA 439 (SCA) (“*Rossouw*”).

²⁴ 2012 (5) SA 142 (CC) (“*Sebola*”).

²⁵ 2014 (3) SA 56 (CC) (“*Kubyana*”).

²⁶ For a full discussion of the NCA’s field of application, see Kelly-Louw (and Stoop) *Consumer credit regulation in South Africa* 2012 ch 2, Van Zyl “The scope of application of the National Credit Act” in Scholtz (ed) *Guide to the National Credit Act* 2008 ch 4 and Otto and Renke “Types of credit agreement” in Scholtz (ed) *Guide to the National Credit Act* 2008 ch 8.

agreements²⁷ that are entered into at arm's length,²⁸ in South Africa,²⁹ unless an exemption applies.³⁰ The NCA has a wide field of application and applies to basically all agreements in terms whereof credit is granted to consumers, irrespective of the type of goods or services involved. There is no monetary limit on the application of the NCA, and the legislature clearly intended to extend the Act's protection to as many credit users as possible.³¹

1.2 Research statement

The aim of this dissertation is to investigate the section 129(1)(a) debt-enforcement notice in terms of the NCA, as tested and interpreted in light of the Constitution by the CC. The focus is on the delivery of the notice and the extent to which the notice must come to the consumer's attention in order to be effective. The amendment to section 129 by the insertion of section 129(5) to (7) subsequent to the CC decisions will also be examined, with the aim to ascertain whether the amendments were in line with, and gave effect to, the mentioned decisions. With this purpose in mind, examples of court cases decided in respect of the section 129 notice after the insertion of section 129(5) to (7) are addressed. My aim is to make suggestions in respect of these issues (the delivery of the debt-enforcement notice and the measure of receipt required by the consumer in order to render the notice effective) that have been the subject of discussion for many years, before and after amendment of the NCA.

²⁷ The NCA applies to credit facilities, credit transactions and credit guarantees. S 8(1). The credit facility is defined in s 8(3), the credit transactions are listed in s 8(4) and defined in s 1, with the exception of the other agreement (a catch-all definition to bring credit agreements that do not resort under one of the specifically defined and named credit agreements under the Act's ambit), which is defined in s 8(4)(f), and the credit guarantee is defined in s 8(5).

²⁸ A credit agreement must be concluded "at arm's length" in order for the NCA to be applicable. The concept indicates that the parties to the credit agreement are independent of each other. S 4(2)(b) lists arrangements that are not at arm's length. If one of these arrangements is encountered, the Act is not applicable. Credit agreements between juristic persons where the one has a controlling interest in the other is an example.

²⁹ The NCA also applies to a credit agreement that was concluded outside the Republic but that has an influence in the country.

³⁰ The main exemptions to the NCA's field of application are juristic persons (defined in s 1) as consumers with an asset value or annual turnover of R1 million or more and juristic persons that have an asset value or annual turnover of less than R1 million but that enter into large credit agreements. S 4(1)(a)(i) and (b). A large credit agreement is a mortgage agreement and any other credit transaction, except a pawn transaction, with a principal debt of R2 500 000 or more. S 9(4). S 4(1)(a)(i) and (b) and s 9 must be read with the Determination of Thresholds Regulations, GN 713, GG 28893, 2006-06-01. The NCA only has limited application to those juristic persons it applies to (s 6), but those juristic persons are protected in terms of Ch 6 Part C. The NCA does not apply to policies of insurance, leases of immovable property, or stokvels. S 8(2)(a) – (c). Stokvels are defined in s 1.

³¹ See Renke thesis par 7.2.3.3.

1.3 Research objectives and corresponding chapters

Relevant research objectives were formulated in respect of the above-mentioned research statement, for the purpose of setting out, focusing, and limiting the parameters of the dissertation. The research objectives and the chapters in which they are addressed are as follows:

- (a) Chapter 1 introduces the dissertation, sets out the research statement and research objectives, delineates the dissertation's scope, and provides definitions of key concepts used frequently in the dissertation.
- (b) Chapter 2 provides a brief background to the Constitution as the supreme Act of South Africa, against which all other Acts could be tested. Chapter 2 further provides a brief discussion of the interaction between the Constitution and the NCA, with reference to comments by authors and the courts.
- (c) The focus of Chapter 3 is the section 129(1)(a) debt-enforcement notice in terms of the NCA, in particular the delivery of the notice and the extent to which the default of the consumer, and thus the notice, must be drawn to the consumer's attention. Sections and subsections that are interrelated to section 129(1)(a) will also be considered. The discussion includes the *Sebola* and *Kubyana* judgments by the CC, and thus the influence of the Constitution on the NCA's debt-enforcement notice. Finally, the insertion of section 129(5) to (7) in the NCA by the 2014 NCA Amendment Act will be addressed, followed by a discussion of decisions in cases heard after the amendment of the Act.
- (d) Chapter 4 contains the final conclusions, remarks, and recommendations.

1.4 Delineations

The provisions of section 129(1)(a) and (b), read with section 130(1), in the NCA cover a number of aspects, and the debt-enforcement notice is undoubtedly very important. The latter is indicated by the attention received by these provisions in academic literature³² and, in

³² Scholtz ch 2, Scholtz ch 12, and Govender and Kelly-Louw 2018 21 *PER/PELJ* have already been mentioned. See also e.g. Kelly-Louw (and Stoop) ch 13, Van Heerden and Otto "Debt enforcement in terms of the National Credit Act" 2007 *TSAR* 655; 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 1)" 2007 *De Jure* 222; Boraine and

particular, the courts. However, aligned with the focus and delineation of my dissertation, not all the aspects in relation to the section 129(1)(a) notice, such as address for delivery of the notice and the contents of the notice, will be addressed, or will not be addressed fully. The plethora of case law in respect of the delivery and receipt of the section 129(1)(a) notice makes a complete discussion of all the cases impracticable. Only trends or divergent opinions are identified, with specific attention to *Rossouw*, *Sebola*, and *Kubyana*, with only brief reference to the facts of the cases. The debt-enforcement notices in terms of the Hire-Purchase Act and the Credit Agreements Act, mentioned above,³³ will not be addressed in this dissertation.

Although the focus of my dissertation is the Constitution's influence on the section 129(1)(a) debt-enforcement notice in terms of the NCA, the Constitution and selected provisions in its Bill of Rights will only be addressed briefly. The field of application of the NCA, which determines the scope of its protection available to consumers, is thus also important in respect of the Act's debt-enforcement protection provisions in Chapter 6, Part C. However, aside from what was stated briefly above³⁴ in respect of the NCA's field of application, the latter is not addressed further in the dissertation.

1.5 Terminology

For the purpose of this dissertation, the definitions in section 1 of the NCA are applicable:

“**consumer**”, in relation to a credit agreement to which the Act applies, means –

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

‘**credit**’, in the instance where it is used as a noun, means-

- (a) a deferral of payment of money owed to a person, or a promise to defer such a payment; or
- (b) a promise to advance or pay money to or at the direction of another person.

Renke “Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part 2)” 2008 *De Jure* 1; Kelly-Louw “The overcomplicated interpretation of the word ‘may’ in sections 129 and 123 of the National Credit Act” 2015 *SALJ* 245.

³³ Par 1.1.

³⁴ Par 1.1.

‘credit agreement’ means "an agreement that meets all the criteria set out in section 8."

‘credit provider’, in relation to a credit agreement to which this Act applies, means –

- a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;
- b) the party who advances money or credit under a pawn transaction;
- c) the party who extends credit under a credit facility;
- d) the mortgage 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.

‘this Act’ "includes a Schedule to this Act, a regulation made or a notice issued under this Act".

CHAPTER 2

THE CONSTITUTION AND ITS INTERRELATIONSHIP WITH THE NCA

2.1 Introduction

The Constitution is the supreme law of the Republic of South Africa.³⁵ In terms of section 2 of the Constitution, conduct or law that is not consistent with the Constitution is not valid, and the obligations that the Constitution imposes must be performed.³⁶ It is therefore necessary for all legislation to be consistent with the Constitution in order for such legislation to be valid. Accordingly, as mentioned before, the NCA (and other legislative enactments) in the Republic is assessed against the Constitution for the purpose of determining its validity.³⁷ This chapter provides a brief background to the Constitution, followed by a brief discussion of the interaction between the Constitution and the NCA.

2.2 The Constitution

The Constitution, as the supreme law of South Africa,³⁸ was promulgated on 18 December 1996, and commenced on 4 February 1997.³⁹ Chapter 2 of the Constitution, which contains the Bill of Rights and is comprised of sections 7 to 39, is applicable to all laws in the Republic of South Africa, and is the bedrock of the country's democracy.⁴⁰ The judiciary, the executive, and the legislature are bound by the Bill of Rights.⁴¹ With regard to juristic and natural persons, the Constitution, to a large extent, binds such persons subject to specific qualifications.⁴² To this end, the CC⁴³ has indicated that the Republic of South Africa's legal system is modelled

³⁵ Ss 1(c) 2 of the Constitution.

³⁶ *Ibid.*

³⁷ See *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* CCT278/19 & CCT279/19, in which the CC held that certain provisions in the legislation titled the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 are unconstitutional and therefore invalid, on the grounds that the relevant provisions did not adequately comply with regard to the rights to legal privilege, freedom of expression, access to courts, and privacy in the Bill of Rights. See also Nagel *et al Commercial Law* 2019 par 2.11.

³⁸ *Ibid.* See also Nagel *et al* pars 2.16 and 2.19.

³⁹ The Constitution.

⁴⁰ S 8(1) of the Constitution, Brits “The National Credit Act and the Bill of Rights: Towards a constitutional view of consumer credit regulation” 2017 *TSAR* 471.

⁴¹ *Ibid.*

⁴² S 8(2) – (4) of the Constitution.

⁴³ “CC”.

by the Constitution.⁴⁴ Furthermore, the force of the entirety of the law in the Republic is derived from and controlled by the Constitution.⁴⁵

These fundamental principles are important with regard to the NCA and its provisions, which are socio-economic and transformative in nature.⁴⁶ The NCA has to be consistent with the Constitution in order to be valid. Its interpretation, similar to that of any other legislative enactment in the country, must be done in a manner that supports and promotes the spirit and objectives of the Bill of Rights.⁴⁷

2.3 The Constitution and the NCA

The Constitution only makes a reference that is direct in relation to consumer protection as being one of the topics whereby the provincial and national legislatures both exercise contemporaneous legislative authority.⁴⁸ The Bill of Rights does not have a particular section that specifically confers a right to consumer protection on persons, nor does it make it mandatory for the government to grant consumer protection that is legislated.⁴⁹ Accordingly, and in contrast to other pieces of legislation, such as the Promotion of Access to Information Act, which gives effect to section 32 of the Constitution,⁵⁰ the promulgation of the NCA was not in relation to a particular right in the Bill of Rights.⁵¹ However, with reference to section 3, which deals with the purpose of the NCA,⁵² and the preamble of the Act, the NCA is not neutral in relation to the Constitution.⁵³

In the preamble of the NCA, reference is made to matters such as the advancement of a marketplace that is non-discriminatory and fair with regard to the accessibility of consumer credit and the promotion of black ownership and black economic empowerment in respect of the consumer credit industry.⁵⁴ Furthermore, section 3 details that one of the purposes of the Act is to advance and promote the economic and social welfare of South Africans by, *inter*

⁴⁴ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA* 2000 (2) SA 674 (CC) par 44, Brits 2017 TSAR 471.

⁴⁵ Brits 2017 TSAR 471.

⁴⁶ See the remark by Scholtz in Scholtz ch 2 par 2.5, quoted in par 1.1 above.

⁴⁷ S 39(2) of the Constitution, Brits 2017 TSAR 472.

⁴⁸ Sch 4 of the Constitution, Brits 2017 TSAR 472.

⁴⁹ *Ibid.*

⁵⁰ Act 2 of 2000, "Promotion of Access to Information Act"; Brits 2017 TSAR 472.

⁵¹ Brits 2017 TSAR 472.

⁵² See par 1.1.

⁵³ Brits 2017 TSAR 472.

⁵⁴ *Ibid.*

alia, "promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions",⁵⁵ "addressing and correcting imbalances in negotiating power between consumers and credit providers",⁵⁶ and "promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers".⁵⁷

It has been argued that these objectives in the NCA, at a minimum, connect the Act with the right to equality enshrined in section 9 of the Constitution. The Constitution provides, in section 1(a), that the realisation of equality is one of the values on which the Republic is founded.⁵⁸ To this end, sections 9(1) and 9(2) of the Constitution stipulate that every person is seen as equal in terms of the law, and that every person is entitled to the benefit and protection of the law in a manner that is equal, and that equality is inclusive of the equal and entire enjoyment of all freedoms and rights.⁵⁹

In addition to this, it has been argued that other rights in the Bill of Rights may be connected to the effects or the purposes of the NCA, such as the right relating to the access to information⁶⁰ and the right to access to the courts,⁶¹ by providing for debt-enforcement processes that are fair and mechanisms dealing with dispute resolution, the right to be protected from the arbitrary deprivation of property, the right to housing,⁶² and, more generally, the values of freedom and dignity.⁶³ In specific circumstances, a right may be limited, for instance, where credit providers may not make use of mechanisms relating to enforcement prior to fulfilling particular requirements of the NCA.⁶⁴ The rights to property and equality are commonplace in disputes relating to the constitutionality of the NCA.⁶⁵

Notwithstanding the absence of an express right to consumer protection in the Constitution, because credit providers and consumers are either juristic or natural persons, there are constitutional rights that are conferred on them, and the provisions of the NCA have an impact

⁵⁵ S 3(a).

⁵⁶ S 3(e).

⁵⁷ S 3(d).

⁵⁸ Brits 2017 TSAR 472.

⁵⁹ Brits 2017 TSAR 472.

⁶⁰ S 2 of the Constitution; Brits 2017 TSAR 472.

⁶¹ S 34 of the Constitution, Brits 2017 TSAR 472.

⁶² S 26 of the Constitution, Brits 2017 TSAR 473.

⁶³ Brits 2017 TSAR 473.

⁶⁴ Ss 129 and 130, Brits 2017 TSAR 473.

⁶⁵ Scholtz ch 2 par 2.5.

on such rights by either limiting or promoting them.⁶⁶ In addition to constitutional rights, credit providers and consumers are entitled to rights in terms of common law that are recognised in terms of the Constitution, to the extent that such rights are consistent with the Bill of Rights.⁶⁷ The right to seek the performance of a right in terms of a common law property or contractual right is, in certain instances, protected by at least one of the sections contained in the Bill of Rights.⁶⁸ In terms of section 39(2) of the Constitution, every tribunal, court, or forum, when developing customary law or common law, and in instances of the interpretation of legislation, is required to promote the purport, objectives, and spirit of the Bill of Rights. Moreover, in terms of section 2 of the NCA, titled “Interpretation”, the NCA must “be interpreted in a manner that gives effect to the purposes set out in section 3”.⁶⁹ Consequently, the interpretation of the NCA must be done in light of its purposes, but also requires interpretation against the background of the purport, objectives, and the spirit of the Bill of Rights.⁷⁰ It has been remarked that the Act's purposes may be deemed as a restatement of the Bill of Rights' values in a manner that is contextualised.⁷¹

Thirteen CC cases have been decided dealing directly with the NCA. Decisions by the CC, as the “highest court of the Republic”, is a source of law. The CC has jurisdiction in constitutional matters, but also to decide in any other matter that “raises an arguable point of law of general public importance which ought to be considered by [the CC]”.⁷² In what follows, remarks by the courts that illustrate the relationship between the Constitution and the NCA are provided.

In *Standard Bank of South Africa Ltd v Dlamini*,⁷³ Pillay J remarked that, as far as the NCA is concerned, “the constitutional right to equality comes to mind immediately. The Preamble to the Constitution and to the NCA connect them”.⁷⁴ In *Nkata v Firstrand Bank Limited and Others*⁷⁵, the CC, with reference to *Sebola*, remarked that “the purposes of the [NCA] are directly attributable to the constitutional values of fairness and equality”.⁷⁶ Moseneke DJC, in

⁶⁶ Brits 2017 TSAR 473.

⁶⁷ S 39(3) of the Constitution.

⁶⁸ Brits 2017 TSAR 473.

⁶⁹ S 2(1) of the NCA.

⁷⁰ Brits 2017 TSAR 483.

⁷¹ *Ibid.*

⁷² The Constitution Seventeenth Amendment Act 72 of 2012 broadened the CC's jurisdiction in this respect. See *De Klerk v Griekwaland Wes Korporatief Bpk* 2014 (8) BCLR 922 (CC) par 13. See also Nagel *et al* par 2.19.

⁷³ 2013 (1) SA 219 (KZD) (“*Dlamini*”).

⁷⁴ *Dlamini* par 27.

⁷⁵ 2016 (4) SA 257 (CC) (“*Nkata*”).

⁷⁶ *Nkata* par 96.

Nkata,⁷⁷ remarked that the “[NCA] seeks to infuse values of fairness, good faith, reasonableness and equality... [Credit givers] ought to realise that at play in the dispute... [are] the civilised values of our Constitution”.

In respect to the section 129(1)(a) NCA debt-enforcement notice, the CC had to make decisions regarding interpretation of the Act in two cases, *Sebola* and *Kubyana*. These cases are discussed in detail in the following chapter.⁷⁸ However, a few remarks are appropriate here in the context of this chapter.

In *Sebola*, the interpretation adopted by the SCA⁷⁹ in *Rossouw* was challenged by the consumers, with particular reference to sections 39(2) and 8(3) of the Constitution.⁸⁰ The credit provider insisted that the interpretation by the SCA was not contrary to the promotion of the objectives, purport, and spirit of the Bill of Rights.⁸¹ The credit provider based this argument on the grounds that the Act is intended to keep the balance between credit providers and consumers, and that the argument submitted by the consumers may limit, unjustifiably so, the right of access to the courts of the credit provider.⁸²

In making its decision, the CC noted that, in *Rossouw*, the SCA lacked the benefit of considering arguments that were particularly related to the effect of the numerous interpretations in terms of the Constitution.⁸³ The CC further remarked that the question was whether the SCA placed sufficient reliance on considerations that are constitutional in giving meaning to the provisions in the NCA.⁸⁴ The CC confirmed that, as the NCA was promulgated for, amongst other things, the promotion of a non-discriminatory and fair marketplace that is a gateway to consumer credit, considerations that are constitutional are vital. Furthermore, the CC affirmed that the approach adopted must be purposive, and that it must be with reference to the preamble and objectives of the NCA, as well as the right to equality contained in the Bill of Rights.⁸⁵ Cameron J went on to state that the NCA’s objectives and the manner that they are to be attained are linked to the commitment of the Constitution to realising equality.

⁷⁷ Par 94.

⁷⁸ Pars 3.3.4 and 3.3.6 respectively.

⁷⁹ “SCA”.

⁸⁰ Brits 2017 TSAR 485.

⁸¹ *Ibid.*

⁸² *Sebola* par 21.

⁸³ At par 34; Brits 2017 TSAR 485.

⁸⁴ At par 36; Brits 2017 TSAR 485.

⁸⁵ Scholtz ch 2 par 2.5.

Consequently, due to the connection between the right of equality in terms of the Constitution and the Act's purposes, the CC was conferred with the jurisdiction to determine the case.⁸⁶

In *Kubyana*, which followed a number of High Court cases in which *Sebola* was interpreted differently, the CC had to provide much-needed clarity regarding the section 129(1)(a) notice.⁸⁷ The consumer argued that the Constitution, with specific reference to section 32(1)(b), supported the consumer's argument that there was evidence that the section 129(1)(a) notice case did not reach the consumer in this case. The requirement of delivery of the section 129(1)(a) notice was thus not complied with.⁸⁸

Section 32(1)(b) of the Constitution provides that every person is entitled to be provided with access to information that is in the possession of persons other than themselves, which information is necessary for the persons in question to protect or exercise any of their rights.⁸⁹ The consumer argued that his right had been infringed because he had not received the section 129(1)(a) notice, which had information that was required for the protection and the exercising of the consumer's rights.⁹⁰ The court was persuaded by the credit provider's argument, in that the right contemplated in section 32(1)(b) of the Constitution is covered by the Promotion of Access to Information Act and, as such, the consumer is not permitted to place reliance on section 32(1)(b) of the Constitution directly.⁹¹

The CC confirmed that the interpretation of the NCA's provisions in relation to the section 129(1)(a) notice is connected to the constitutional goal of realising equality. Such interpretation "implicates fundamental notions of equity in, and the transformation of, the credit market".⁹² The CC reconfirmed the principles that relate to the right of equality as detailed in the *Sebola* case.⁹³ Furthermore, the CC remarked that legislation must be interpreted in line with the applicable constitutional rights.

In conclusion, the CC in *Kubyana* remarked that the interpretation of section 129 that is correct is the one in which a balance is struck between the interests of the credit provider and those of

⁸⁶ *Ibid.*

⁸⁷ Brits 2017 TSAR 486.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Kubyana* at par 11.

⁹¹ At par 13.

⁹² At par 16; Brits 2017 TSAR 487.

⁹³ Scholtz ch 2 par 2.5.

the consumer.⁹⁴ Lastly, Brits alleges that the remarks by the CC may be connected to the rights relating to access to courts and property of credit providers, and that the limitation of such rights may only occur in instances where there are circumstances that make it justifiable.⁹⁵

⁹⁴ At par 21; Brits 2017 *TSAR* 487.

⁹⁵ Brits 2017 *TSAR* 487.

CHAPTER 3

THE SECTION 129(1)(a) NOTICE IN TERMS OF THE NCA

3.3 Introduction

In this chapter, the section 129(1)(a) debt-enforcement notice in terms of the NCA, which was introduced in Chapter 1,⁹⁶ is discussed in more detail. Section 129(1)(a) is discussed in conjunction with sections 129(1)(b) and 130(1). It is important to note that the aforementioned sections in the NCA have not been amended since they became effective on 1 June 2007. It is also important to reiterate that my focus is on the method to be used by the credit provider to bring the notice to the consumer's attention, linked to the question whether such a notice will only have force and effect if brought to the consumer's attention. The case law history regarding these questions or issues leading up to the CC decisions in *Sebola* and *Kubyana* are set out briefly, followed by a discussion of the two CC cases. Thereafter, the insertion of section 129(5) to (7) in the NCA through the 2014 NCA Amendment Act will be addressed briefly, followed by the discussion of a decision by the High Court after the 2015 amendment of the Act.

3.2 Section 129(1)(a) and (b) read with section 130(1) of the NCA

Part C of Chapter 6 in the NCA is titled "Debt enforcement by repossession and judgment", and provides for, *inter alia*, "[r]equired procedures before debt enforcement",⁹⁷ "[d]ebt procedures in a Court"⁹⁸, "[r]epossession of goods", and "[p]rohibited collection and enforcement practices".⁹⁹

Section 129(1)(a) and (b) provides as follows:

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

- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

⁹⁶ Par 1 1.

⁹⁷ S 129.

⁹⁸ S 130.

⁹⁹ S 133.

- (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 (1) provides the following:

- “(1) 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(10), or section 129(1), as the case may be;
 - (b) in the case of a notice contemplated in section 129(1), the consumer has –
 - (i) not responded to that notice; or
 - (ii) responded to the notice by rejecting the credit provider’s proposals; and
 - (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.”

I first offer a few general remarks regarding section 129(1)(a) and (b), read with section 130(1). Section 129(1)(a), the debt-enforcement notice in terms of the NCA, applies in respect of a consumer who is in default in terms of a credit agreement. The most prevalent form of default committed by credit consumers is, naturally, default by the debtor.

Section 129(1)(a), which concerns a written notice by the credit provider to the consumer to draw the consumer’s default to the consumer’s attention, creates the impression that the credit provider has an option to provide the consumer with the notice. This is indicated by the use of the word “may” in the subsection. However, the notice is compulsory. That is made clear by the provisions of section 129(1)(b), which provides that debt enforcement in a court (legal proceedings) may not commence before compliance by the credit provider with the provisions of section 129(1)(a)¹⁰⁰ or section 86(10), depending on the case at hand,¹⁰¹ and before compliance with the requirements in section 130(1).

The credit provider must not only draw the default to the consumer’s attention, but it must also propose to the consumer to approach a debt counsellor,¹⁰² alternative dispute resolution-

¹⁰⁰ See *Nedbank v The National Credit Regulator* 2011 (3) SA 581 (SCA) (“*Nedbank*”) par 8. See also Kelly-Louw “The overcomplicated interpretation of the word ‘may’ in sections 129 and 123 of the National Credit Act” (2015) 132 *SALJ* 245.

¹⁰¹ The difference between the s 129(1)(a) and the section 86(10) notice is that the former is used by a credit provider to enforce a debt in a court against a consumer who is in default but who is not subject to debt review in terms of s 86. For debt review, see below. The s 86(10) notice is used against a consumer who is in default but is also subject to debt review in terms of s 86 to terminate the debt review. Once the debt review is terminated by the credit provider, it can commence with debt enforcement. Debt review and debt enforcement may not be ongoing at the same time.

¹⁰² The “debt counsellor” is a natural person who may be approached by a consumer who is over-indebted for debt review of the consumer’s debt in terms of s 86. However, the SCA in *Nedbank* (par 7) held that the reason

agent,¹⁰³ consumer court, or ombud with jurisdiction.¹⁰⁴ The purpose of the proposal is made clear in section 129(1)(a) itself, namely to resolve any dispute that exists between the credit provider and the consumer, or “to develop and agree on a plan” to bring the instalments that are in arrears in terms of the credit agreement up to date. These being the purposes of the debt-enforcement notice were confirmed in *Nedbank*.¹⁰⁵

Although section 129(1)(a) only makes mention of bringing the default to the consumer’s attention and the abovementioned proposals, the courts, over time, elaborated on the compulsory contents of the notice. The notice must warn the consumer that, if the default is not corrected in the time provided in the notice, the credit provider may institute legal proceedings in a court to enforce the debt.¹⁰⁶ The amount of the instalments in arrears must also be mentioned in the notice.¹⁰⁷

Section 129(1)(b) links the section 129(1)(a) notice to the provisions of section 130(1). In terms of section 130(1), the credit provider may approach a court only for an order requesting the enforcement of a credit agreement “if, at that time”, which is the time that summons is issued in a court to institute legal proceedings against the consumer in default.¹⁰⁸ At the time of the institution of legal proceedings, certain requirements must have been met: (a) the consumer must still be in default; (b) the consumer must already have been in default for a period of 20 business days¹⁰⁹ in terms of the credit agreement; (c) at least 10 business days must have elapsed since the delivery of the section 129(1)(a) or the section 86(10) notice;¹¹⁰ (d) the consumer must have failed to respond to the notice, or must have responded by rejecting the

for the suggestion in the s 129(1)(a) notice that the consumer approaches a debt counsellor is not for debt review, but for one of the purposes mentioned in s 129(1)(a).

¹⁰³ Defined in s 1. The NCA provides for alternative dispute resolution in s 134.

¹⁰⁴ Defined in s 1.

¹⁰⁵ Pars 9 and 14.

¹⁰⁶ “Debt enforcement” in the NCA means the enforcement of any of its remedies in the credit agreement or in terms of the common law by the credit provider. The concept includes the cancellation of the credit agreement and a claim to repossess the goods subject to the agreement. See *Nedbank* par 12.

¹⁰⁷ See Scholtz ch 12 par 12.4.8.

¹⁰⁸ See Scholtz ch 12 par 12.4.3.

¹⁰⁹ “Business days” are defined in s 2(5) as working days, excluding Saturdays, Sundays, and public holidays. If a number of business days are provided for in the NCA between the occurrence of two events, the last day is included and the first day is excluded.

¹¹⁰ S 130(1)(a).

proposals in the notice;¹¹¹ and, (e) in the case of an instalment agreement, secured loan, or lease, the consumer must not already have surrendered the goods.¹¹²

Two distinguishable periods are involved in terms of section 130 (1) before debt enforcement may commence: 20 business days, starting from the day after the consumer went into default for the first time, and 10 business days, starting from the day after the delivery of the section 129(1)(a) notice to the consumer. These periods may run concurrently, provided that the section 129(1)(a) notice is delivered to the consumer soon after the consumer's default.

3.3 The delivery of the section 129(1)(a) notice

3.3.1 Introduction

In what follows, the main directions followed by the High Courts in respect of the delivery of the section 129(1) debt-enforcement notice that gave rise to *Rossouw* in the SCA are provided. This is followed by a discussion of the decision in *Rossouw*. Next, the CC's decision in *Sebola*, the different directions taken by the High Courts after *Sebola* and then *Kubyana*, the second decision by the CC, are discussed. The 2015 amendment¹¹³ to section 129 is discussed next, followed by a subsequent decision by the High Court.

Section 129(1)(a) read with section 129(1)(b) of the NCA provides that a consumer's default must be drawn to the consumer's notice by the credit provider before the credit provider may commence instituting legal proceedings against the consumer in terms of the Act. The wording "[must] draw the default to the notice of the consumer" in section 129(1)(a) is novel in that it was not used previously in consumer credit legislation. However, section 129(1)(a) and (b) does not specify the method by which the debt-enforcement notice must be brought to the consumer's notice. Section 130(1)(a) requires that "at least 10 business days have elapsed since the credit provider delivered a notice to the consumer". Before the 2015 amendment, the failure by the legislature to define the concept "delivered" in the NCA caused uncertainty and conflicting decisions by the High Courts.¹¹⁴ However, before the divergent decisions by the High Courts are discussed briefly, background must first be provided.

¹¹¹ S 130(1)(b).

¹¹² S 127 provides for the surrender of the goods in terms of one of the mentioned credit agreements. The credit agreements involved concern movable goods and are defined in s 1 of the NCA.

¹¹³ Reference is made to the insertion of s 129(5) to (7) in the NCA by the 2014 NCA Amendment Act, which became effective in 2015. See par 1.1.

¹¹⁴ For a complete discussion of the authorities, see Scholtz ch 12 par 12.4.4.

The Regulations promulgated in terms of the NCA¹¹⁵ contain a definition of “delivered”. In terms of regulation 1, “**“delivered”**, unless otherwise provided for, means sending a document by hand, fax, e-mail, or registered mail to an address chosen in the agreement by the proposed recipient”. However, it is important to note that Regulation 1 introduces the definitions in terms of the Credit Regulations as follows: “**1. Definitions.**– In these Regulations, any word or expression defined in the Act bears the same meaning as in the Act *and*”. The “and” is then followed by the definitions.

Section 65, titled the “Right to receive documents”, makes provision for the delivery of documents to the consumer. Section 65(2) is of importance.¹¹⁶ It provides different methods of delivery of documents to consumers if a method of delivery is not prescribed by the Minister in the Credit Regulations for purposes of the Act. These methods of delivery are: (a) in person,¹¹⁷ (b) by ordinary mail; (c) by fax; (d) by email; or (e) by printable web page.¹¹⁸ The “person required to deliver [the] document [in terms of the Act] must make the document available to the consumer” in one of the aforementioned ways. The consumer must choose the method of delivery from these options, which will probably be done in the credit agreement.¹¹⁹

3.3.2 High Court decisions before *Rossouw*

The first reported case that dealt with the issue of the delivery of the section 129(1)(a) notice was *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*.¹²⁰ The consumer argued that the credit provider did not comply with section 129(1)(a), read in conjunction with section 130, as the section 129(1)(a) notice was sent to an incorrect address.¹²¹ In sharing its views, the court pointed out that the NCA diverges from the position of the pieces of legislation that it repealed in that, for example, the Credit Agreements Act prescribed that sending a notice by registered mail was sufficient to notify a person who received the credit of the person’s default. The NCA,

¹¹⁵ GN R489, GG 28864 2006-05-31, “Credit Regulations”.

¹¹⁶ S 65(1) provides that “every document” that must be delivered in terms of the NCA “must be delivered in the prescribed manner, if any”. No method for the delivery of documents for purposes of the Act is prescribed in the Credit Regulations.

¹¹⁷ At the business premises of the credit provider. Delivery may also be done in person to any other address designated by the consumer, but then the consumer must pay for the delivery. The consumer will probably indicate the place of delivery, if applicable, in the credit agreement.

¹¹⁸ S 65(2)(a)(i) – (iv).

¹¹⁹ S 65(2)(b).

¹²⁰ 2009 (2) SA 512 (D) (“*Prochaska*”). See also Scholtz ch 12 par 12.4.5. See also Mills “National Credit Act 34 of 2005 – Section 129 notice – dispatch or receipt” 2009 (Aug) *De Rebus* 27.

¹²¹ *Ibid.*

by contrast, requires a credit provider to comply with section 129(1)(a) by bringing a default in terms of a credit agreement to the notice of a consumer.¹²²

It was stated by the court that the wording of the NCA's provisions in section 129(1)(a), read with section 130(1), which include "providing notice", "draw the default to the notice of the consumer" and "delivered a notice", have the collective effect of illustrating the intention of the legislature to require a credit provider to meet a much higher standard than the threshold of merely sending a notice by registered mail.¹²³ Accordingly, the court found that, in terms of the NCA, a credit provider must bring a default in terms of a credit agreement to the notice of the consumer in a manner that satisfies a court that the consumer has actually had the default brought to the consumer's notice by the credit provider.¹²⁴

As a result, the court held that, if a consumer had elected the *domicilium* address, the credit provider must, in terms of section 129(1)(a), read in conjunction with section 130(1), send the notice to the *domicilium* address.¹²⁵ It has been noted that the court missed an opportunity to explore the issue of and provide its views on whether the consumer must actually receive the section 129(1)(a) notice for a credit provider to be considered to have complied with the requirement of delivery.¹²⁶

In the case of *Munien v BMW Financial Services (SA) (Pty) Ltd*,¹²⁷ the section 129(1)(a) notice had been delivered to the consumer's elected address, which was in an area that did not have adequate postal services for the delivery to the elected address. It was on this basis that the respondent alleged that the credit provider had failed to comply with section 129(1)(a) read in conjunction with section 130.¹²⁸ Wallis J came to the conclusion that the manner of delivery that is required for the purpose of a section 129(1)(a) notice is as defined in the Credit Regulations, instead of as set out in section 65.¹²⁹ Accordingly, Wallis J held that a section 129(1)(a) notice is considered to be "delivered" in the instance where it has been sent by the credit provider to an address elected by the consumer using registered post. This is notwithstanding the considerations of whether the section 129(1)(a) notice comes to the

¹²² *Prochaska* 524D.

¹²³ *Prochaska* 524G.

¹²⁴ *Prochaska* 524H.

¹²⁵ *Prochaska* 524J-525A.

¹²⁶ Scholtz ch 12 par 12.4.4.

¹²⁷ 2010 (1) SA 549 (KZD) ("*Munien*").

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

attention of the consumer or whether the section 129(1)(a) notice can actually be delivered to the address elected by the consumer.¹³⁰

In noting that various methods of delivery are contemplated in the Credit Regulations, such as by e-mail, hand, fax, or registered post, Wallis J provided that the action of "sending" the section 129(1)(a) notice constitutes delivery.¹³¹ It is submitted that this was an incorrect finding, as the definition of "delivered" in the Credit Regulations, which are subordinate legislation, was used to interpret the Act, thereby raising difficulties, which are detailed below.

The more appropriate question to raise in the assessment of whether there has been compliance with section 129(1)(a), as was provided by the court in the case of *First Rand Bank Ltd v Dhlamini*,¹³² is whether the default was brought to the notice of the defaulting consumer in writing by the credit provider, as opposed to whether the credit provider had the section 129(1)(a) notice "delivered" to the consumer.¹³³ In light of this, the court found that the requirement of the NCA is that a section 129(1)(a) notice must bring the default of a consumer to the consumer's actual notice.¹³⁴

The result of this was that non-compliance by a credit provider to bring a consumer's default to the consumer's actual notice would prevent such credit provider from undertaking legal proceedings to enforce the credit agreement, and that any legal proceedings instituted prior to such compliance will be found to be premature.¹³⁵ It is submitted that this finding is incorrect, as it is impossible to determine what has actually been drawn to the notice of a consumer, and therefore impossible to evidence actual compliance with section 129(1)(a) read in conjunction with 130(1). This is demonstrated below.

The finding by the court in the case of *Starita v Absa Bank Ltd*,¹³⁶ which contrasted the finding in *Munien*, stated that it was erroneous to apply a definition that is set out in the Credit Regulations in the interpretation of a provision in the NCA, and that any attempt at interpreting the provisions of the Act using the term "delivered" as defined in the Credit Regulations must be disregarded.¹³⁷ The court went on to refer to section 168, titled "Serving documents", and

¹³⁰ *Munien* par 12. See also Mills 2009 (Aug) *De Rebus* 27 and Scholtz ch 12 par 12.4.3.

¹³¹ *Munien*.

¹³² 2010 (4) SA 531 (GNP) ("*Dhlamini*").

¹³³ Scholtz ch 12 par 12.4.4.

¹³⁴ *Dhlamini*.

¹³⁵ *Dhlamini* par 31.

¹³⁶ 2010 (3) SA 443 (GSJ) ("*Starita*").

¹³⁷ *Starita* par 18.4.

noted that no significant difference existed in the meaning of the terms "served" and "delivered".¹³⁸ Following this reasoning, the court found that section 168 applies to a section 129(1)(a) notice and, as it is required to be "delivered" in terms of section 130, such requirement will be considered to have been met when the section 129(1)(a) notice was dispatched by registered mail to the most recently known address of the consumer.¹³⁹ The court further noted that it is not at odds with any of the purposes of the NCA to require a credit provider to only dispatch, by way of registered mail, a section 129(1)(a) notice.¹⁴⁰ The qualification to this is that the credit provider must provide evidence that it did, in fact, dispatch the section 129(1)(a) notice by registered mail to the address that had been elected by the consumer.¹⁴¹

3.3.3 *Rossouw*

The SCA in *Rossouw* found that the definition of the term "delivered" in the Credit Regulations must be disregarded in the interpretation of section 129(1)(a) read in conjunction with section 130(1) of the NCA. However, the court went on to find that the delivery of a section 129(1)(a) notice must be done in the manner prescribed by section 65(2) read in conjunction with section 96.¹⁴² As the elected method of delivery in the case was registered mail, which is not a contemplated method of delivery in terms of section 65(2), the court provided that registered mail is not at odds with section 65(2), due to the legislature having permitted postal delivery by ordinary mail, which is a less reliable method of delivery than registered mail. Registered mail is not detrimental to the interests of either the consumer or the credit provider.¹⁴³

Lastly, the SCA found that, as the NCA provides that a consumer may elect the method of delivery, the intention of the legislature is inferred to be that the risk of the consumer not receiving the section 129(1)(a) notice is borne by the consumer.¹⁴⁴ It is submitted that the SCA was correct in finding that the definition of "delivered" in the Credit Regulations should not be used to interpret the provisions of the NCA.

¹³⁸ *Starita* pars 18.5 and 18.6.

¹³⁹ *Ibid.*

¹⁴⁰ *Starita* par 18.11.

¹⁴¹ *Ibid.*

¹⁴² *Rossouw* pars 26 – 29.

¹⁴³ *Rossouw* par 29.

¹⁴⁴ *Ibid.*

3.3.4 *Sebola*

In *Sebola*, the CC had to make a determination whether the requirement of delivery of a section 129(1)(1)(a) notice entails the notice actually reaching the consumer.¹⁴⁵ In the determination of the issue, the court provided a minority and majority judgment.¹⁴⁶ It should be noted that the majority judgment of the court is binding; Cameron J delivered the judgment.¹⁴⁷ The case related to an instance where a section 129(1)(a) notice was dispatched to the consumer by way of registered mail.¹⁴⁸ However, the postal service diverted the section 129(1)(a) notice to an incorrect post office.¹⁴⁹ Cameron J provided that section 129, in relation to the delivery requirement, should not be considered without reference to section 130.¹⁵⁰

In this regard, the court went on to note that section 129 places emphasis on to whose notice the information relating to a default should come, and to whom the credit provider must provide notice, whereas section 130 details what requirements must be met in order to comply with the requirement for “delivery”. The difficulty that is presented by considering section 129 in isolation, as the court noted, is that it appears that section 129 places a requirement on a credit provider to meet a standard that may not be attainable.¹⁵¹ Furthermore, the court provided that the vital enquiry in relation to the delivery of a section 129(1)(a) notice is the requirement that the Act places on a credit provider to establish, as a fact, that the credit provider has delivered the notice.¹⁵²

This is in light of the fact that, as the court noted, in most instances, only the consumer will have knowledge of what has come to the consumer’s individual attention, and it is because of this that the credit provider will be unable to directly establish that it has brought the default of such consumer to the consumer's attention.¹⁵³ Consequently, the court provided that this indicates the importance of section 130, as it prescribes the requirement of the credit provider to "deliver" the section 129(1)(a) notice and, in addition, to prove that the section 129(1)(a) notice has been delivered to the consumer by the credit provider to the court's satisfaction.¹⁵⁴

¹⁴⁵ Scholtz ch 12 par 12.4.4.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Sebola*.

¹⁴⁹ *Sebola* par 5; Scholtz ch 12 par 12.4.4.

¹⁵⁰ *Sebola* pars 52 – to 59; Scholtz ch 12 par 12.4.4.

¹⁵¹ *Ibid.* See also Govender and Kelly-Louw 2018 21 *PER/PELJ* par 4.2.

¹⁵² *Sebola* par 57; Scholtz ch 12 par 12.4.4.

¹⁵³ *Ibid.*

¹⁵⁴ *Sebola* pars 61 – 66; Scholtz ch 12 par 12.4.4.

In the assessment of what is meant by the term "delivered", the court made reference to sections 168, 96, and 65 which, while not expressly applicable to section 130, have an impact on the interpretation of the term "delivered" as used in section 130.¹⁵⁵ Accordingly, the court found that, as a minimum, a section 129(1)(a) notice must be sent by registered mail.¹⁵⁶ Furthermore, in light of the importance placed on the section 129(1)(a) notice, a credit provider is required to aver, in a manner that will be satisfactory to a court, that, on a balance of probabilities, the section 129(1)(a) notice that was "delivered" to a consumer did, in fact, reach the defaulting consumer.¹⁵⁷

It was on this basis that the court found that the credit provider ought to provide evidence that the section 129(1)(a) notice had been delivered to the correct post office. Consequently, the case of *Sebola* inserted a new requirement for the purposes of section 129, which imposed a duty on the credit provider to establish that a section 129(1)(a) notice was sent to the consumer's address. A number of academics have shared the opinion that the CC was excessive regarding the insertion of a new requirement for compliance in terms of section 129, and that the judgment in *Sebola* did not bring about legal certainty.¹⁵⁸

In order for the credit provider to establish that a section 129(1)(a) notice has been delivered, a "track and trace" that is provided after the section 129(1)(a) notice has been dispatched by the post office must be sourced from the South African Post Office's website.¹⁵⁹ The court noted that the credit provider also has to, in its particulars of claim or summons, make the allegation that the section 129(1)(a) notice has been delivered to a post office that is relevant.¹⁶⁰ In addition, the credit provider must aver that, in the ordinary course of business, the post office would have delivered a notification slip that notifies the defaulting consumer that there is a registered item that is ready for collection at the relevant post office.¹⁶¹ The court went on to find that, in conjunction with evidence that a section 129(1)(a) notice has been delivered to the correct post office, a reasonable assumption may be made by the court. If there is no contrary evidence, a credit provider may make the credible averment that a notification of the arrival of

¹⁵⁵ *Sebola* par 66; Scholtz ch 12 par 12.4.4.

¹⁵⁶ *Sebola* par 68; Scholtz ch 12 par 12.4.4.

¹⁵⁷ *Sebola* par 74; Scholtz ch 12 par 12.4.4.

¹⁵⁸ Scholtz ch 12 par 12.4.4. See also Fuchs "The impact of the National Credit Act on the enforcement of a mortgage bond" 2013 *PER/PELJ* 387; Otto and Otto *National Credit Act Explained* 2013 117-118.

¹⁵⁹ *Sebola* par 76; Scholtz ch 12 par 12.4.4.

¹⁶⁰ *Sebola* par 77; Scholtz ch 12 par 12.4.4.

¹⁶¹ *Ibid.*

a section 129(1)(a) notice has reached the defaulting consumer, and a reasonable consumer would procure said notice from the post office.¹⁶²

The court also provided that, in the ordinary course, the evidence required is sufficient evidence of the delivery of the section 129(1)(a) notice as required in section 130.¹⁶³ In the instance where default judgment is sought by the credit provider, the absence of the consumer's objection entitles the enforcement court to come to the conclusion that the averment made by the credit provider that the section 129(1)(a) notice did, in fact, reach the defaulting consumer is not opposed by the consumer.¹⁶⁴

However, in the instance where there is an assertion by the consumer in legal proceedings that the section 129(1)(a) notice was misdirected upon arrival at the post office, or it remained uncollected, or it was unattended to after collection, the enforcement court is required to make a determination whether, notwithstanding the evidenced efforts of the credit provider to deliver the section 129(1)(a) notice, the assertions of the defaulting consumer are factual.¹⁶⁵ If the enforcement court finds that the defaulting consumer's assertions are factual, the court must, in terms of section 130(4)(b), adjourn the legal proceedings.¹⁶⁶ A number of conflicting judgments followed on the basis of the reasoning in the CC's judgment in *Sebola*. This was until the CC had to consider the requirement of delivery of a section 129(1)(a) notice again, in *Kubyana*.¹⁶⁷

3.3.5 High Court decisions after *Sebola*

Following the decision in *Sebola*, a number of High Court decisions were conflicting with regard to the requirement of delivery of a section 129(1)(a) notice.¹⁶⁸ This was as a result of the uncertainty relating to whether the case of *Sebola* overruled the court's finding in *Rossouw* that the risk of a consumer not receiving the section 129(1)(a) notice rests with the consumer.¹⁶⁹ In the case of *Nedbank Ltd v Binneman*,¹⁷⁰ the section 129(1)(a) notice had been dispatched to

¹⁶² *Ibid.*

¹⁶³ *Sebola* pars 78 and 79; Scholtz ch 12 par 12.4.4.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ Scholtz ch 12 par 12.4.4.

¹⁶⁸ Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* LLD thesis UP 2015 ch 4.

¹⁶⁹ *Ibid.*

¹⁷⁰ 2012 (5) SA 569 (WCC) ("*Binneman*").

and received by the relevant post office.¹⁷¹ However, the section 129(1)(a) notice was then marked as having been unclaimed, and was returned to the credit provider. This was indicated by the track-and-trace document.¹⁷²

The court held that the finding in the case of *Sebola* in no way overruled the principle in the cases of *Rossouw* and *Munien* that a credit provider need not prove that the consumer has, in fact, received the section 129(1)(a) notice. Where a consumer elects a delivery method, the risk of not receiving the section 129(1)(a) notice rests with the consumer.¹⁷³ The court further remarked that the judgment in the case of *Sebola* simply provided clarity by stating that sending a section 129(1)(a) notice by way of registered post is not sufficient, and that a credit provider must establish that the relevant post office received the section 129(1)(a) notice.¹⁷⁴

In *Absa Bank Ltd v Mkhize*,¹⁷⁵ which involved four default judgment applications, the track-and-trace document established that the section 129(1)(a) notices in three of the applications were returned to the credit provider, and marked as "unclaimed".¹⁷⁶ The court found that the majority judgment in *Sebola* established a standard that the section 129(1)(a) notice must actually come to the notice of the consumer.¹⁷⁷ This standard is qualified by evidence that illustrates that the consumer did not, in fact, receive the section 129(1)(a) notice. Such evidence will override any inference from the facts that the consumer received the section 129(1)(a) notice.¹⁷⁸ Consequently, the court held that the requirement for delivery was not met in relation to the three section 129(1)(a) notices that were returned and marked as "unclaimed".¹⁷⁹

Notwithstanding the judgment in the case of *Mkhize*, the court in the case of *Absa Bank Ltd v Petersen*¹⁸⁰ elected to follow the interpretation of the court in *Binneman* of the finding in *Sebola*.¹⁸¹ The court went on to provide that a presumption may be made that, where an item that is registered reaches the consumer's relevant post office, it is likely that the consumer would have been provided with a notification that such registered item is ready for collection,

¹⁷¹ Scholtz ch 12 par 12.4.4.

¹⁷² *Ibid.*

¹⁷³ *Binneman* par 6.

¹⁷⁴ *Ibid.*

¹⁷⁵ 2012 (5) SA 574 (KZD) ("*Mkhize*").

¹⁷⁶ Scholtz ch 12 par 12.4.4.

¹⁷⁷ *Mkhize* par 53.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Mkhize* par 59.

¹⁸⁰ [2012] 4 All SA 642 (WCC) ("*Petersen*").

¹⁸¹ *Petersen* par 18; Scholtz ch 12 par 12.4.4.

and that a reasonable consumer would collect such item.¹⁸² Where the consumer does not collect such item after being provided with a notification, an inference may be made that the consumer is unreasonably indifferent.¹⁸³

Furthermore, where the credit provider has taken steps that are reasonable for the purpose of bringing the section 129(1)(a) notice to the consumer's attention, the risk of the consumer not receiving such notice is placed on the consumer.¹⁸⁴ The court further supported this stance by remarking that the interpretation of the *Sebola* judgment in the *Binneman* case is in line with the understanding of the effect of the majority judgment in *Sebola* as indicated in the *Sebola* minority judgment.¹⁸⁵ It is submitted that this is the correct approach in relation to the reference of the objective factor of reasonableness on the part of the consumer, which is further elucidated below.

The decision in *Mkhize*, in contrast, was supported in the case of *Balkind v Absa Bank Ltd*.¹⁸⁶ The court in *Balkind* found that the majority judgment in *Sebola* incorrectly read in a requirement in section 129(1)(a) stipulating that it is mandatory for a section 129(1)(a) notice to be received by a consumer without regarding the interpretation of the provisions of the NCA.¹⁸⁷ Accordingly, the court found that proof that a section 129(1)(a) notice was not received by a consumer is capable of overriding the requirement that such notice ought to have been received by the relevant post office.¹⁸⁸ The court in the case of *Standard Bank of South Africa Ltd v Van Vuuren*¹⁸⁹ supported the interpretation of the majority judgment of *Sebola* in the case of *Mkhize*.¹⁹⁰

The SCA, in considering the *Mkhize* matter, found that the *Mkhize*¹⁹¹ case was appealable, and that the court *a quo* was correct in finding that proof that a section 129(1)(a) notice was not received by a consumer cannot be disregarded. Consequently, the court noted that a credit provider must, on a balance of probabilities, establish that a section 129(1)(a) notice was received by the consumer.¹⁹² However, where there is evidence that indicates that the section

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Petersen* par 19; Scholtz ch 12 par 12.4.4.

¹⁸⁶ 2013 (2) SA 486 (ECC) (“*Balkind*”).

¹⁸⁷ *Balkind* par 35.

¹⁸⁸ *Balkind* par 36.

¹⁸⁹ Unreported GSJ case no. 32874/2012.

¹⁹⁰ Scholtz ch 12 par 12.4.4.

¹⁹¹ *Absa Bank Ltd v Mkhize* [2014] 1 All SA 1 (SCA) (“*Mkhize SCA*”).

¹⁹² *Mkhize SCA* par 2; Scholtz ch 12 par 12.4.4.

129(1)(a) notice was not received by the consumer, such evidence overrides any inference that could be made from any facts that suggest the contrary.¹⁹³ To the extent that there is evidence that a consumer has deliberately failed to retrieve the section 129(1)(a) notice, a court may, once it has adjourned the matter and set out actions required of the credit provider, find that the consumer acted *mala fide* and provide judgment.¹⁹⁴

3.3.6 *Kubyana*

In *Kubyana*, the CC was tasked with assessing the manner in which the majority judgment in the case of *Sebola* had been interpreted, as the CC recognised that there had been a number of conflicting decisions regarding interpretation of section 129.¹⁹⁵ Therefore, it was mandatory for the CC to determine the matter for purposes of providing clarity and to ensure an orderly credit marketplace, with the obligations and rights of credit providers clarified.¹⁹⁶ In this case, the credit provider established that it had dispatched a section 129(1)(a) notice to the correct post office, and that the post office had notified the consumer, on two occasions, to collect the registered item. However, the consumer failed to collect the registered item. The defaulting consumer argued, with reliance on *Sebola*, that the credit provider had not complied with the requirement of the delivery of the section 129(1)(a) notice. This was done on the basis that the section 129(1)(a) notice was sent back, marked "unclaimed", which indicated that delivery had not been effected by the credit provider as required by the NCA. The implication was that the section 129(1)(a) notice was not drawn to the notice of the defaulting consumer.¹⁹⁷

In its assessment, the court drew attention to three aspects of section 129.¹⁹⁸ The first is that there exists no requirement that a credit provider bring the section 129(1)(a) notice to the subjective attention of the defaulting consumer, nor a requirement that the consumer receive personal service of the section 129(1)(a) notice, for delivery to be effective.¹⁹⁹ Secondly, it is provided in the NCA that use of the postal service is a method of delivery that is acceptable.²⁰⁰

¹⁹³ *Mkhize SCA* par 47.

¹⁹⁴ *Ibid.*

¹⁹⁵ Govender and Louw 2018 21 *PER/PELJ* par 4.2.

¹⁹⁶ Singh *A critical analysis of the home mortgage foreclosure requirements and procedure in South Africa and proposals for legislative reform* PhD UKZN (2020) ch 4.

¹⁹⁷ *Kubyana* par 11; Scholtz ch 12 par 12.4.4.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

In the instance where a consumer has made the choice of receiving a section 129(1)(a) notice by a way that entails post, the obligations that are ordinarily imposed on the credit provider to effect delivery are inclusive of the credit provider abiding by the choice made by the consumer, thereby incurring the expense of dispatching the notice by registered mail as opposed to ordinary mail. This includes making sure that the section 129(1)(a) notice is dispatched to the post office branch that is correct for the purpose of availing the section 129(1)(a) notice for collection by the consumer.²⁰¹ The third aspect is that the actions that a credit provider ought to take to adequately comply with the requirement of delivery are actions that would have the effect of drawing the section 129(1)(a) notice to a reasonable consumer's attention.²⁰²

Consequently, the court found that if the term "delivery" is understood to mean that even a reasonable consumer, in the same circumstances that are under consideration, would not have been in receipt of the section 129(1)(a) notice, such meaning of the term "delivery" would be at odds with the NCA's process. Such steps by the consumer are focused on court avoidance, and will provide a platform that enables settlements between a consumer and a credit provider, as the protection afforded by the Act would only extend to exceptional consumers.²⁰³

On this basis, the court concurred with what was set out in the case of *Sebola*, in that, for the delivery of the section 129(1)(a) notice to be considered effective, it can be reasonably assumed that the consumer has received notification that the section 129(1)(a) notice is at the relevant post office, and that a reasonable consumer would have collected the section 129(1)(a) notice.²⁰⁴ The court stated that, in the instance where a credit provider has complied with the prescribed requirement of delivery of a section 129(1)(a) notice, and such credit provider does not receive communication from the consumer within the period stipulated in the Act, then it does not make sense that any further requirements be placed on the credit provider.²⁰⁵

The Act does not prescribe any further requirements for delivery for the credit provider, and the court noted that, upon completion of the abovementioned steps, a credit provider may commence to seek enforcement of the credit agreement.²⁰⁶ The court further provided that, once the credit provider has followed the prescribed steps, but the consumer has not provided

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ As per *Sebola* at par 72; Scholtz ch 12 par 12.4.4.

²⁰⁴ Scholtz ch 12 par 12.4.4.

²⁰⁵ *Kubyana* par 35; Scholtz ch 12 par 12.4.4. See also Govender and Kelly-Louw 2018 21 *PER/PELJ* par 4.2.

²⁰⁶ *Ibid.*

a response to the credit provider in relation to the section 129(1)(a) notice in a manner that is reasonable, the consumer forgoes the protection afforded by the Act with regard to the mechanisms of dispute resolution that are consensual.²⁰⁷

Consequently, a consumer that has acted unreasonably will not be permitted to interrupt legal proceedings relating to the enforcement of the credit agreement on the basis that the credit provider has not complied with the requirement of delivery of a section 129(1)(a) notice. The court further provided that, as the objective factor is a reasonable consumer, in an instance where a credit provider has sent a section 129(1)(a) notice in a manner prescribed by the Act (such as where the section 129(1)(a) notice was sent by registered mail and a notification to the consumer regarding the item was delivered by the post office to the address elected by the consumer), delivery will not be effective if the notice would still not have been brought to the attention of a reasonable consumer.²⁰⁸

The onus is placed on the consumer to establish that the notice was not drawn to the consumer's attention, and to provide the reason as to why such notice was not drawn to the consumer's attention.²⁰⁹ Therefore, the onus moves to the consumer to indicate the reason why it was reasonable for the consumer to fail to collect the section 129(1)(a) notice in an instance where the credit provider dispatched the section 129(1)(a) notice to the relevant post office, and where there is evidence that the section 129(1)(a) notice was received by the post office.²¹⁰

The consumer made the argument that the concept of obligations that are placed on a reasonable consumer does not have any grounds in terms of the NCA. The court dismissed this argument, and provided that it emanates from section 3 and the provisions relating to notice in the Act.²¹¹ To this end, the court noted that, as the NCA empowers the consumer by permitting the consumer to elect the method of delivery in relation to notices, section 65(2) and section 96 place a consequential duty on the consumer to take any necessary steps to ensure the receipt of notices that are in line with the elected method of delivery.²¹²

Accordingly, in the instance where a consumer has chosen to receive section 129(1)(a) notices by way of registered mail, the consumer is obligated to then act upon notifications received

²⁰⁷ *Ibid.*

²⁰⁸ *Kubyana* par 36; Scholtz ch 12 par 12.4.4.

²⁰⁹ *Ibid.*

²¹⁰ Brits 2017 TSAR 487.

²¹¹ *Kubyana* par 37; Scholtz ch 12 par 12.4.4.

²¹² *Ibid.*

from the post office alerting the consumer that there is a registered item to be collected. The exception is the instance where a reasonable consumer would otherwise not have acted upon such notification.²¹³ In *Kubyana*, the consumer did not provide a reason for failing to collect the section 129(1)(a) notice despite the post office's notifications.²¹⁴

With reference to the majority judgment in the case of *Sebola*, the court went on to note that the court's findings in the case in question in relation to the nature of the obligations of a credit provider to deliver a section 129(1)(a) notice are consistent with the principles provided for in *Sebola*.²¹⁵ However, the court made specific reference to paragraph 79 and paragraph 87 of the majority judgment in *Sebola*, and provided that the language used is couched in broad terms, opening the floodgates for misinterpretation of the requirement.²¹⁶ The court differentiated the facts of *Sebola* and *Kubyana*. *Sebola* did not relate to a situation where the credit provider validly delivered a section 129(1)(a) notice but such notice was then not collected or attended to by the consumer.²¹⁷ It is on this basis that the court noted, at paragraph 79 and paragraph 87, that the majority judgement in *Sebola* was unnecessarily broad.²¹⁸

In qualifying the majority judgment in *Sebola*, the court pointed out that, insofar as the majority judgment suggests that a credit provider will not be in compliance with the requirement for the delivery of a section 129(1)(a) notice due to a consumer that has, in a manner that is unreasonable, failed to attend to the notice or to collect a notice correctly sent, the majority judgment in *Sebola* did not state the law correctly.²¹⁹ In substantiating this point, the court provided that the Act does not implicitly provide, nor can it be understood to mean that, a consumer is permitted to ignore, in an unreasonable manner, the consequences of the choice that the consumer has made in relation to receiving notices by way of registered mail in the instance where notifications relating to a registered item have been dispatched to the elected address.²²⁰ Furthermore, the court remarked that, whilst consumers must be the recipients of the full extent of the protection provided by the NCA, what the Act attempts to achieve must

²¹³ *Ibid.*

²¹⁴ Govender and Kelly-Louw 2018 21 *PER/PELJ* par 4.2.

²¹⁵ *Kubyana* par 43; Scholtz ch 12 par 12.4.4.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Kubyana* par 46; Scholtz ch 12 par 12.4.4.

not be susceptible to abuse by consumers who look to use the protection in a manner that is in bad faith or unreasonable.²²¹

The court went on to deal with the contents of paragraph 74 in the *Sebola* case, which provides that there is an obligation on the credit provider to establish, as a fact, that the section 129(1)(a) notice did reach the consumer.²²² The court clarified that this obligation should be interpreted in relation to the attempt by the court in *Sebola* to set out a manner of fact assessment for courts. Courts have to make a determination regarding a default judgment application that is considered in the context of a section 129(1)(a) notice. The aim is to illustrate what inferences regarding the facts may be made in circumstances where there are inadequate sources relating to the facts.²²³ In qualifying this, the court provided that any inference that it is a requirement of the Act for a credit provider to make sure that a section 129(1)(a) notice has actually reached the defaulting consumer is misplaced.²²⁴

This is, as the court noted, due to section 96(1), which requires notices in terms of the Act to be delivered at the consumer's elected address.²²⁵ Sending a section 129(1)(a) notice by registered mail must be considered with regard to the section 96(1) requirement that a credit provider dispatch a section 129(1)(a) notice to the relevant post office branch. The post office branch then dispatches to the consumer a notification that indicates that there is a registered item to be collected by the consumer.²²⁶ In this regard, it is not the case that a section 129(1)(a) notice will be physically delivered to a consumer in the instance where it is dispatched by registered mail as opposed to ordinary mail.²²⁷ Accordingly, in the instance where a consumer has chosen to remain unresponsive to a notification delivered by a post office, despite the consumer being capable of responding to the notification, the consumer is not permitted to make a claim that the requirement for delivery has not been complied with by the credit provider.²²⁸

The court, in further clarification of the majority judgment in *Sebola*, noted that the phrase "contrary indication", as used in paragraph 77 and paragraph 88 in *Sebola*, is in need of

²²¹ *Ibid.*

²²² *Kubyana* par 47; Scholtz ch 12 par 12.4.4.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Kubyana* par 48; Scholtz ch 12 par 12.4.4.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

clarification.²²⁹ In clarifying the phrase, the court dismissed the notion that "contrary indication" means that, in the instance where a section 129(1)(a) notice has not come to the consumer's subjective attention, the requirement for delivery has not been complied with.²³⁰ Furthermore, the court dismissed the notion that "contrary indication" is established in the following instance: the section 129(1)(a) notice is reverted to the credit provider despite the section 129(1)(a) notice being dispatched to the relevant post office branch by the credit provider. In addition, the post office branch dispatched a notification to the consumer's elected address that there was a registered item awaiting collection.²³¹

The court further provided that "contrary indication" as referred to in *Sebola* is applicable to two distinct deductions that may be made by a court.²³² The first deduction is that, where a post office dispatches a notification indicating that there is a registered item awaiting collection, it can be deduced that the notification did reach the defaulting consumer.²³³ The second deduction is that a consumer, acting reasonably, collected the registered item referred to in the first deduction, the section 129(1)(a) notice.²³⁴

In relation to the first deduction, what could be considered a contrary indication is an element that indicates that, in that particular situation and notwithstanding the attempts by the credit provider, the relevant notification was not delivered to the chosen address of the consumer.²³⁵ In relation to the second deduction, what could be considered a contrary indication is an element that illustrates that, notwithstanding that the notification had been delivered to the consumer's chosen address and the consumer failing to retrieve the section 129(1)(a) notice, the consumer's conduct was reasonable.²³⁶

Accordingly, in the instance where a credit provider has sourced the track-and-trace document that illustrates that the section 129(1)(a) notice was dispatched to the relevant post office branch, and has illustrated that said post office branch dispatched a notification relating to the collection of the section 129(1)(a) notice to the consumer, such credit provider will generally have illustrated that the requirement for the delivery of a section 129(1)(a) notice has been

²²⁹ *Kubyana* par 49; Scholtz ch 12 par 12.4.4.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² *Kubyana* par 52; Scholtz ch 12 par 12.4.4.

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

complied with.²³⁷ In such instance, the credit provider may make the averment that the credit provider has taken the steps required to make sure that the section 129(1)(a) notice reaches the defaulting consumer.²³⁸

The onus then shifts to the consumer to provide reasons why, in the circumstances, it is unreasonable to expect that the section 129(1)(a) notice was drawn to the attention of the defaulting consumer.²³⁹ This is on the basis that information that relates to the determination of whether the consumer's conduct was reasonable normally falls within the exclusive ambit of the consumer's knowledge.²⁴⁰ The court's utilisation of the objective factor of a "reasonable consumer" resolved the issue of the requirement of delivery in relation to a section 129(1)(a) notice prior to the amendment by the 2014 NCA Amendment Act, discussed below.²⁴¹ It has been submitted that the aim of section 129 may only be fulfilled in the instance where the credit provider and the consumer work in solidarity and in a manner that illustrates good faith, with the view to resolving a default.²⁴² The case of *Kubyana* gave clarity in relation to the requirements that a credit provider ought to comply with in terms of the NCA regarding the delivery of a section 129(1)(a) notice.²⁴³

3.3.7 The 2015 amendment to section 129

Following the CC's decisions in *Sebola* and, in particular, *Kubyana*, the legislature sought to amend section 129 to clarify the requirement of delivery.²⁴⁴ Section 129 was amended in terms of the 2014 NCA Amendment Act to make provision for the manner of delivery required for a section 129(1)(a) notice.²⁴⁵ Section 129(5) to (7) has now been included in section 129 of the NCA.

The effect of these sections is that a consumer is obligated to choose one of two methods of delivery²⁴⁶: delivery "to an adult person at the location designated by the consumer"²⁴⁷ or "by

²³⁷ *Kubyana* par 53; Scholtz ch 12 par 12.4.4.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ Scholtz ch 12 par 12.4.4.

²⁴² Singh PhD ch 4.

²⁴³ Govender and Kelly-Louw 2018 21 *PER/PELJ* par 4.2.

²⁴⁴ *Ibid.*

²⁴⁵ S 32 of the 2014 NCA Amendment Act.

²⁴⁶ S 129(6).

²⁴⁷ S 129(5)(a).

registered mail".²⁴⁸ To adequately prove delivery, the credit provider must make reference to "written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or posted agency",²⁴⁹ or "the signature or identifying mark of the recipient contemplated in subsection (5)(b)", being the "adult person" mentioned above.²⁵⁰

The amendment to section 129 became effective on 13 March 2015.²⁵¹ Consequently, section 65(2) no longer applies to the delivery of a section 129(1)(a) notice.²⁵² Accordingly, the method of the delivery of a section 129(1)(a) notice is supposed to have been clarified. It has been noted that the phrase used in section 129(5)(b) in relation to a location that has been designated by the consumer is not clear, and that it could refer to the consumer's *domicilium* noted in the credit agreement.²⁵³

In addition, the section 129(1)(a) notice is not required to be delivered by a sheriff if the chosen method of delivery is section 129(5)(b).²⁵⁴ Consequently, it has been argued that a section 129(1)(a) notice delivered in terms of section 129(5)(b) by the credit provider, or a person acting on behalf of the credit provider, that is delivered by hand to an adult person at the designated address of the consumer, with the person effecting the delivery having obtained the mark or signature of the adult person receiving the section 129(1)(a) notice, will constitute *prima facie* evidence of delivery in compliance with the Act.²⁵⁵

Furthermore, it has been submitted that the acknowledgement of the recipient in a delivery in terms of section 129(5)(b) must be clear that it is in relation to a section 129(1)(a) notice.²⁵⁶ In an instance where an adult person neglects to or chooses not to acknowledge receipt of the section 129(1)(a) notice as required, it has been submitted that a court will probably permit section 129(7) to be interpreted in a manner that allows the person who delivered the section 129(1)(a) notice to depose to having effected the delivery of the notice in an affidavit.²⁵⁷ It is submitted that this would be an interpretation that is not at odds with the NCA, and permits a credit provider to effect a delivery even in instances where the adult person, who may not have

²⁴⁸ S 129(5)(b).

²⁴⁹ S 129(7)(a).

²⁵⁰ S 129(7)(b).

²⁵¹ See par 1.1.

²⁵² Scholtz ch 12 par 12.4.4.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

any contractual relation with the credit provider and is not obligated to acknowledge such delivery, refuses to acknowledge receipt.

In relation to section 129(7), it has been submitted that delivery can be established by the post office providing a statement, a letter, or the extraction of a track-and-trace document that illustrates that the section 129(1)(a) notice was indeed dispatched to the correct post office.²⁵⁸ It is submitted that this view is correct in light of the phrase "written confirmation" in section 129(7)(b), which does not limit the form of the written confirmation.

It should be noted that the Electronic Communications and Transactions Act²⁵⁹ provides, at section 19(4), that, in an instance where any law allows a person to dispatch information or a document by registered mail, such obligation is considered to be satisfied where a copy of the information or document is sent electronically to the post office. In addition, the post office must register and dispatch the information or document to the correct electronic address as provided by the person sending the information or document. Accordingly, it is submitted that a section 129(1)(a) notice may be dispatched by registered e-mail by the credit provider.²⁶⁰ This is in the instance where the consumer has elected an electronic *domicilium*.²⁶¹ The credit provider can only be said to have complied with the requirement of delivery in an instance where the credit provider adhered to the consumer's elected method of delivery.

3.3.8 High Court decisions after the 2015 amendment

In the case of *Mabondo v Standard Bank of South Africa*,²⁶² it was argued by the consumer that the credit provider had failed to deliver the section 129(1)(a) notice for purposes of the NCA, as the section 129(1)(a) notice was served on the consumer's son, who was nine years old. However, section 129(5) had not become applicable at the date on which the summons was served.²⁶³ Notwithstanding this fact, the court noted that it is unthinkable to expect the delivery of a section 129(1)(a) notice to a child who is nine years old to be adequate.²⁶⁴

²⁵⁸ *Ibid.*

²⁵⁹ Act 25 of 2002.

²⁶⁰ Scholtz ch 12 par 12.4.4.

²⁶¹ *Ibid.*

²⁶² [2016] ZAGPPHC 1007 (2 December 2016) ("*Mabondo*") pars 8 and 16.

²⁶³ Scholtz ch 12 par 12.4.4.

²⁶⁴ *Ibid.*

CHAPTER 4

CONCLUSIONS AND FINAL REMARKS

The purpose of this dissertation was to discuss the debt-enforcement notice in terms of section 129(1)(a) of the NCA and the influence of the Constitution on the NCA's provisions in this regard. The focus was on the delivery of the section 129(1)(a) notice and the related question whether the section 129(1)(a) notice must come to the consumer's actual attention in order to be effective.²⁶⁵ The reason is that the provisions in section 129(1)(a), read with sections 129(1)(b) and 130 (1) in the NCA, are novel.²⁶⁶ The section 129(1)(a) notice must draw the defaulting consumer's default "to the consumer's notice".

The Constitution undoubtedly influenced the development of the NCA's provisions in respect of the section 129(1)(a) debt-enforcement notice. This much is evidenced by the two CC cases discussed in the dissertation, *Sebola*²⁶⁷ and *Kubyana*,²⁶⁸ and the constitutional principles involved in these decisions.²⁶⁹ *Sebola* created confusion, and gave rise to conflicting decisions by the High Courts.²⁷⁰ The decision in *Sebola* therefore had to be clarified by the CC in *Kubyana*.²⁷¹

Subsequent to the CC's decisions, which were preceded by a plethora of court cases²⁷² that attempted to clarify the NCA's debt-enforcement notice provisions that did not provide for the method of delivery of the section 129(1)(a) notice, the NCA was amended. The amendment took place in terms of the 2014 NCA Amendment Act, which became effective in 2015, and entailed the insertion of subsections in section 129. Section 129(5) to (7) now not only provides for the method of delivery of the section 129(1)(a) notice, but also what constitutes sufficient proof of delivery. The methods of delivery are: in person or by means of registered mail.²⁷³ However, one decision by the High Court, in *Mabondo*, indicates that the provisions of section 129(5) to (7) are not infallible.²⁷⁴

²⁶⁵ Pars 1.1, 1.2 and 1.4.

²⁶⁶ Par 3.3.1.

²⁶⁷ Par 3.3.4.

²⁶⁸ Par 3.3.6.

²⁶⁹ See par 2.3.

²⁷⁰ Par 3.3.5.

²⁷¹ Par 3.3.6.

²⁷² This includes a decision by the SCA in *Rossouw*. See pars 3.3.2 and 3.3.3.

²⁷³ Par 3.3.7.

²⁷⁴ Par 3.3.8.

Section 129(5) to (7) seems to be an attempt by the legislature, subsequent to *Sebola* and *Kubyana*, to rectify a clear lacuna in the NCA, the failure to define the method of delivery of the section 129(1)(a) notice by the credit provider to the consumer. This failure was, naturally, accompanied by the omission to provide whether the notice must be brought to the consumer's attention in order to be effective.

It has been submitted that the section 129 amendments aligned the Act with the methods of delivery of a notice relating to default.²⁷⁵ The amendments, whilst they may provide much-needed clarification, bring to light new issues, as indicated in *Mabondo*, such as the instance where a section 129(1)(a) notice is delivered at the designated address of the consumer, but to a person who is not an adult. An adult person at the consumer's designated address may also refuse to accept delivery of the section 129(1)(a) notice.²⁷⁶

The question is whether the legislature did not react hastily in promulgating section 129(5) to (7) when the opportunity presented itself to amend the NCA and address the lacunae mentioned above. This is indeed my view. More attention should have been paid to the CC's decisions, in particular in *Kubyana*. The CC in *Kubyana* did not have the benefit of evaluating section 129(5) to (7). However, the CC's decision indicates that the court was cognisant of the fact that it is not possible to legislate the delivery of the debt-enforcement notice in such a way as to address all scenarios that may arise in practice. It is, in particular, not possible to keep both parties to a credit agreement satisfied and to perfectly balance their respective rights and obligations, as envisaged by section 3(d).²⁷⁷ Both parties to the credit agreement must work together and act in good faith to enable the receipt of the debt-enforcement notice in terms of section 129(1)(a). The aim of the notice is to protect the consumer and to afford the latter the opportunity to avoid costly debt-enforcement proceedings in a court. The debt-enforcement notice cannot be avoided indefinitely. Reasonableness is the criterion, as seen in *Kubyana*. I agree with Govender and Kelly-Louw²⁷⁸ that, for now, we only have the amendments to section 129 on the delivery of the notice, and, if a practical challenge presents itself to a court, the approach in *Kubyana* should be followed.

²⁷⁵ Govender and Louw 2018 21 *PER/PELJ* par 6.

²⁷⁶ Par 3.3.7.

²⁷⁷ Par 1.1.

²⁷⁸ Govender and Louw 2018 21 *PER/PELJ* par 6.

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