

**THE APPEALABILITY OF AN ORDER IN TERMS  
OF SECTION 130(4)(b) OF THE NATIONAL  
CREDIT ACT, 34 OF 2005**

**ANDRIES KRUGER**

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**THE APPEALABILITY OF AN ORDER IN TERMS OF SECTION 130(4)(b) OF THE  
NATIONAL CREDIT ACT, 34 OF 2005**

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Prepared under the supervision of

**PROF C VAN HEERDEN**

**DEPARTMENT OF MERCANTILE LAW**

**FACULTY OF LAW**

**UNIVERSITY OF PRETORIA**

submitted by

**ANDRIES COETZEE KRUGER**

(STUDENT NUMBER: 27378838)

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## CHAPTER 1: REQUIREMENTS FOR AN ORDER TO BE APPEALABLE

### 1. INTRODUCTION

The National Credit Act<sup>1</sup> deviates from the repealed Credit Agreements Act<sup>2</sup> and introduced more consumer protection than previously given by the Credit Agreements Act. The National Credit Act deals extensively with the procedures that need to be taken both prior to enforcement, being a notice as contemplated in Section 129(1)(a) sent to the consumer, and enforcement through judicial process.<sup>3</sup> These processes are contained in section 129 to 130 and will be analyzed in detail in this dissertation.

The purpose of this dissertation is to determine the appealability of an order in terms of section 130(4)(b). The crux of section 130(3) and section 130(4)(b) is that if the court is not satisfied that credit provider has complied with all the provisions of the National Credit Act, the court is compelled by section 130(4)(b) to adjourn the matter and make an appropriate order as to the steps that need to be taken by the credit provider to ensure compliance with the National Credit Act. This dissertation will contain an in depth analysis of specifically section 130(4)(b).

Due to the fact that the National Credit Act is silent on the issue of appealability of an order in terms of section 130(4)(b), this dissertation will investigate the requirements for an order to be appealable as established in different case law, and more specifically the requirements as set out in *Zweni v Minister of Law and Order*<sup>4</sup>. All of this will be done against the background of Section 20(1) of the Supreme Court Act<sup>5</sup> which has since been replaced with the Superior Courts Act.<sup>6</sup> It will be submitted that the underlying principles will not be affected by the change in legislation.

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<sup>1</sup> 34 of 2005.

<sup>2</sup> 75 of 1980.

<sup>3</sup> Van Heerden and Borraine: *The Conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act* (2011) 23 SA Merc LJ 45.

<sup>4</sup> 1993 (1) SA 523 (A) para 531 B-D.

<sup>5</sup> Act 59 of 1959.

<sup>6</sup> Act 10 of 2013.

The matter of *Absa Bank Ltd v Mkhize and Another (and two similar) cases*<sup>7</sup> is the leading authority regarding the question whether an order in terms of section 130(4)(b) is indeed appealable. This dissertation will contain a detailed comparison between the judgment of the court *a quo* as well as the judgment of the Supreme Court of Appeal. In *Mkhize*, the Supreme Court of Appeal had different views regarding the appealability of an order in terms of section 130(4)(b). The majority held that the order does not comply with the requirements as crystalized through the various case law and is therefore not appealable which resulted in the case being dismissed with costs. The minority on the other hand held that the order was indeed appealable as it met the requirements as set out in the case law but dismissed the appeal based on the merits.

Appeals used to be governed by section 20 of the now repealed Supreme Court Act<sup>8</sup> which has since been replaced with the Superior Courts Act.<sup>9</sup> The now repealed section 20 of the Supreme Court Act<sup>10</sup> provided as follows:

“(1) An appeal from a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of such a court given appeal shall be heard by the appellate division or a full court as the case may be.”

The content of section 20 differs to an extent from the new section 16 of the Superior Courts Act<sup>11</sup> which provides that:

“(1) Subject to section 15(1), the Constitution and any other law –

- (a) an appeal against any decision of a division as a court of first instance lies, upon leave having been granted –
  - (i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that division, depending on the direction issued in terms of section 17(6); or
  - (ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;

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<sup>7</sup> [2013] JOL 31019 (SCA).

<sup>8</sup> Act 59 of 1959.

<sup>9</sup> Act 10 of 2013.

<sup>10</sup> Act 59 of 1959

<sup>11</sup> Act 10 of 2013.

- (b) an appeal against any decision of a division on appeal to it, lies to the Supreme Court of Appeal upon special leave been granted by the Supreme Court of Appeal;
- (c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with changes required by the context.”

The first difference between the two sections is that section 16, unlike section 20, refers to “an appeal against any decision” whereas section 20 referred to “a judgment or order”. If a decision is not an order or judgment, it will not be appealable.<sup>12</sup> The meaning of “decision” in terms of section 16 has not yet been canvassed by the courts. However, it is submitted that it should not differ from the interpretation of section 20. The second difference is that section 20 refers to “civil proceedings” whereas section 16 is silent what type of matters can be appealed against. The discussion on what type of matter is appealable, is not necessary for the purpose of this dissertation due to the fact that it is submitted by Farlam *et al* that the phrase “in any civil proceedings” bears a wide meaning and therefore refers to any civil proceedings whatsoever.<sup>13</sup> It is further submitted by Farlam *et al* that as far the distinction between civil and criminal proceedings are concerned, it is the subject matter and not the form of the proceedings that defines the character as either civil or criminal.<sup>14</sup> It is submitted that the status quo in this regards has also not been altered by the change in legislation as the section 16 of the Superior Courts Act does not prohibit any type of matter to be brought on appeal.

## JURISDICTION

Section 20 provides the jurisdictional requirements for an appeal.<sup>15</sup> There are two requirements:<sup>16</sup>

- a) the necessary leave to appeal had to be obtained; and
- b) the appeal must be against a judgment or order.

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<sup>12</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-42.

<sup>13</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-46.

<sup>14</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-46A.

<sup>15</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-42.

<sup>16</sup> *Ibid.*

## 2.1 LEAVE TO APPEAL

Section 17 of the Superior Courts Act<sup>17</sup> now governs leave to appeal and provides that:

- (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
  - (a)(i) the appeal would have a reasonable prospect of success; or
  - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
  - (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
  - (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the of the real issues between the parties."

Leave to appeal can be granted by the judge or judges whose judgment or order forms the subject of the appeal or by any other judge or judges of the same court of division in the event that the judge or judges who decided the matter is not readily available.<sup>18</sup> Where leave to appeal is refused by the court *a quo*, the party who was denied leave to appeal can approach the Supreme Court of Appeal for leave to appeal by way of an application to the Registrar.<sup>19</sup>

Farlam *et al*, by referring to *Zweni v Minister of Law and Order*<sup>20</sup>, submits that when a court grants leave to appeal a court should not just consider the jurisdictional requirements.<sup>21</sup> When a court is requested to grant leave to appeal against a judgment or order, it should be careful not to grant leave to appeal in a matter where it will deal with an issue in isolation where the rest of the issues have not been determined.<sup>22</sup> As a general principal, piecemeal consideration of cases is discouraged, with the emphasis now placed on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will

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<sup>17</sup> 10 of 2013.

<sup>18</sup> Section 17(2)(a) of the Superior Courts Act 10 of 2013.

<sup>19</sup> Section 17(2)(b) of the Superior Courts Act 10 of 2013.

<sup>20</sup> 1993 (1) SA 523 (A) para 531 B-D.

<sup>21</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-43.

<sup>22</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-44B.

decisively contribute to its final solution.<sup>23</sup> In the matter of *Health Professions Council v Emergency Medical Supplies t/a EMS*<sup>24</sup> it was held that where an order which is left standing will result in an injustice or the litigant will suffer prejudice, the position will be different.<sup>25</sup>

The Supreme Court of Appeal has an inherent jurisdiction to grant special leave to appeal and entertain appeals in special circumstances in order to prevent substantial and grave injustice.<sup>26</sup> This inherent jurisdiction is in addition to the jurisdiction conferred by statute.<sup>27</sup> A superior court's inherent powers does not extend to the assumption of jurisdiction which has not been conferred by statute, hence an appeal against an order which is not otherwise appealable may not be heard.<sup>28</sup> The Supreme Court of Appeal's inherent jurisdiction is reserved for matters with special circumstances to prevent grave injustice.<sup>29</sup> The Constitution confers jurisdiction on the Supreme Court of Appeal.<sup>30</sup>

## 2.2 'ORDER OR JUDGMENT'

The courts used to distinguish between a judgment, order and a ruling.<sup>31</sup> It was held in *Constantia Insurance Co Ltd v Nohamba*<sup>32</sup> that the words "judgment or order" are used in a special sense due to the fact that not every decision or ruling of a court amounts to a judgment or order.<sup>33</sup> It is submitted by Farlam *et al* that there is no essential difference between judgment and order.<sup>34</sup> Judgment is a decision given upon relief claimed in action proceedings whereas an order is a decision given upon relief claim in

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<sup>23</sup> *Zweni v Minister of Law and Order* [1993] All SA 365 (A) 367.

<sup>24</sup> 2010 (6) SA 469.

<sup>25</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-44B.

<sup>26</sup> Herbstein and Van Winsen *Civil Practice of the High Courts of South Africa* (2009) 1176.

<sup>27</sup> *Ibid.*

<sup>28</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-43.

<sup>29</sup> Herbstein and Van Winsen *Civil Practice of the High Courts of South Africa* (2009) 1177.

<sup>30</sup> Herbstein and Van Winsen *Civil Practice of the High Courts of South Africa* (2009) 1177 refers to *Numsa v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) where it was held that "Yet chapter 8 of the Constitution superseded both the common-law and the interim Constitution. It subsumed the common law powers of this Court, and not only conferred jurisdiction in constitutional matters on it, but constituted it the Highest Court of Appeal in all matters except constitutional matters. It did so in unqualified terms, and those terms are now the source of this Court's jurisdiction."

<sup>31</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-43.

<sup>32</sup> 1986 (3) SA 27 (A).

<sup>33</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-43.

<sup>34</sup> *Ibid.*

motion proceedings.<sup>35</sup> Some decisions of a Court amount to rulings.<sup>36</sup> It was found that if the essence of a ruling in the court a quo is purely interlocutory, it will remain purely interlocutory in effect, if it were to be reversed on appeal.<sup>37</sup> A ruling is the antithesis of a judgment or order as the nature of the decision is not final and is susceptible to alteration by the court a quo.<sup>38</sup> A ruling is also not definitive of the rights of the parties and does not dispose of at least a substantial part of the relief claimed in the main proceedings.<sup>39</sup> Prior to the commencement of the Appeal Amendment Act 105 of 1982 an appeal could be brought against an interlocutory order on condition that the court a quo had granted leave.<sup>40 41</sup>

In the matter of *Zweni*, the Appellate Division, as it was then, held that a 'judgment or order' has three attributes:

- a) The decision must be final in effect and not susceptible to alteration by the court a quo; and
- b) The judgment or order must be definitive of the rights of the parties; and
- c) The judgment or order should at least have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.<sup>42</sup>

It has been held that in determining the nature and effect of a judicial pronouncement, "not merely the form of the order must be considered but predominantly its effect."<sup>43</sup> In *Zweni* it was held that interlocutory orders that have a final and definitive effect on the

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-44B.

<sup>39</sup> *Ibid.*

<sup>40</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-43.

<sup>41</sup> The Court distinguished between simple interlocutory orders and interlocutory orders with the effect being final and definitive. It was held in *South Cape Corporation v Engineering Management Services* that statutes that utilize the word "interlocutory" referred to simple interlocutory orders. This meant that interlocutory orders with final and definitive effect on the main action and simple interlocutory orders with leave were appealable. A mere ruling however was not appealable. It has been held that an order is only regarded as an order or judgment for purposes of appeal if it has a final and definitive effect on the main action. It has also been held that 'judgment and order' still includes simple interlocutory orders. This discrepancy has been clarified in the matter of *Zweni*. (Farlam *et al Erasmus Supreme Court Practice* (1993 et seq) A1-44)

<sup>42</sup> *Zweni v Minister of Law and Order* [1993] All SA 365 (A) 368.

<sup>43</sup> *Ibid.*

main action will constitute an order or judgment for the purposes of appeal.<sup>44</sup> The requirement of “final effect and definitive of the parties’ rights” typifies all judgments and orders.<sup>45</sup>

These principles are however not cast in stone.<sup>46</sup> An order may be appealable, even though it does not have all three attributes as set out in *Zweni*, if it has a jurisdictional effect, dispose of any issue or portion of the issue in the main action, or if the appeal would lead to a just and prompt resolution of the real issue between the parties.<sup>47</sup> It was held in the matter of the *Government of the Republic of South Africa & Others v Von Abo* that it is fair to say that there is no checklist of requirements and that several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.<sup>48</sup>

The interests of justice are of paramount importance when deciding whether an order or judgment is appealable.<sup>49</sup> The Constitutional Court has held that the applicable test is whether the appeal would serve the interest of justice.<sup>50</sup> It further held that the relevant factors will differ from case to case.<sup>51</sup> The Constitutional Court has recently developed factors to assist when deciding whether to hear an appeal based on an interlocutory order.<sup>52</sup> The list is as follows<sup>53</sup>:

- a) the importance of the constitutional issue raised;
- b) whether irreparable harm would result if leave to appeal is refused;

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<sup>44</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-44.

<sup>45</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-44B.

<sup>46</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-44A.

<sup>47</sup> *Ibid.*

<sup>48</sup> [2011] JOL 27109 (SCA) and Farlam *et al Erasmus Superior Supreme Court Practice* (1993 et seq) A1-44A.

<sup>49</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-44C.

<sup>50</sup> *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* 2014 (6) BCLR 726 (CC) para 20.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

- c) whether the interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review;
- d) whether there are prospects of success in the pending review;
- e) whether, in deciding an appeal against an interim order, the appellate court would usurp the role of the review court;
- f) whether interim relief would unduly trespass on the exclusive terrain of the other branches of government, before the final determination of the review grounds;
- g) whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to wasteful use of judicial resources or legal costs.

### 3. CONCLUSION

The established principles of the appealability of an order seems to be unaffected by the small differences between the new section 16<sup>54</sup> and the old section 20<sup>55</sup>. What is paramount to an appeal is the leave from either the court *a quo* or the Supreme Court of Appeal. Regardless of the term ‘decision’ that has been used in section 16, it seems that the Constitutional Court has endorsed *Zweni* in that two of the factors to be taken into account when determining appealability being that the interim order has a final effect or disposes of a substantial portion of the relief sought. The Constitutional Court has set the test as being that of the interest of justice. The Constitutional Court has held that the facts will differ from case to case but determined factors that would serve as an indication whether or not an order is appealable.

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<sup>54</sup> Superior Court Act 10 of 2013.

<sup>55</sup> Supreme Court Act 59 of 1959.

## CHAPTER 2: SECTION 129 AND SECTION 130: REQUIREMENTS AND OBLIGATIONS IMPOSED ON A CREDIT PROVIDER TO ENFORCE A CREDIT AGREEMENT

### 1. INTRODUCTION

Default by consumers is part and parcel of the events in the credit market. The National Credit Act has introduced a significant procedural pre-enforcement layer by requiring a credit provider to comply with specific procedure prior to enforcement of a credit agreement.

In the unfortunate event that the consumer defaults on his/her credit agreement, the National Credit Act makes provision for the credit provider to enforce the credit agreement.<sup>56</sup> The debt enforcement procedure is set out in section 129 to 133 of the National Credit Act. Section 129 provides that:

- “(1) If a 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 jurisdictions, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
  - (b) subject to Section 130(2), may not commence 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.”

From the above it is clear that before legal proceedings to enforce a credit agreement can commence, certain steps need to be taken first. Van Heerden and Boraine describe debt enforcement in terms of the National Credit Act in two (2) steps.<sup>57</sup> The first being the procedures prior to debt enforcement which refers to the notice as

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<sup>56</sup> Section 123(2) of the National Credit Act 34 of 2005.

<sup>57</sup> Van Heerden and Boraine: *The Conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act* (2011) 23 SA Merc LJ 45.

contemplated in section 129(1)(a).<sup>58</sup> The second step being the debt procedures in Court as envisaged in section 130(1).<sup>59</sup> I will firstly deal with the term “enforcement”.

## 2. WHAT IS ENFORCEMENT?

There exists no definition of the word “enforce” in the National Credit Act<sup>60</sup> or National Credit Amendment Act.<sup>61</sup> Otto submits that it is a new concept which is unfortunately not defined which leads to uncertainty about its exact meaning.<sup>62</sup> Van Heerden submits further that for the purposes of part C of chapter 6 of the National Credit Act, enforce refers to the enforcement of the credit agreement through the credit provider’s remedies by means of legal proceedings.<sup>63</sup> Through the years different courts have made different decisions in respect of the meaning of enforcement. In the matter of *Absa Bank Ltd v De Villiers and Another*<sup>64</sup> Fourie J stated that he accordingly share the view of Otto, that it appears that the Legislature has used the word “enforce” in a wide sense, namely the exercising of any of its remedies by a credit provider.

However in *Naidoo v Absa Bank*<sup>65</sup> it was held that sequestration of the debtor’s estate was not an order for the sequestrating creditor’s claim, but a species of execution, affecting not only the rights of the two litigants but involving also the distribution of the insolvent’s property to various creditors.<sup>66</sup> From this judgment it is evident that the sequestration proceedings are for the benefit of all credit providers whereas enforcement of an agreement is only in respect of the specific agreement with a specific credit provider in terms of the National Credit Act. In the matter of *Nedbank Ltd & Others v National Credit Regulator & Another* it was held that enforce, it seems, includes a reference to all contractual remedies including cancellation and ancillary relief, and means the enforcement of those remedies by judicial means.<sup>67</sup>

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<sup>58</sup> (2011) 23 SA Merc LJ 45.

<sup>59</sup> *Ibid.*

<sup>60</sup> 34 of 2005.

<sup>61</sup> 19 of 2014.

<sup>62</sup> Van Heerden in Scholtz *et al Guide to the National Credit Act* (2008 et seq) 12-2.

<sup>63</sup> *Ibid.*

<sup>64</sup> 2009 (5) SA 40 (C) para 13.

<sup>65</sup> 2010 (4) SA 597 (SCA).

<sup>66</sup> *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 (SCA) para 4.

<sup>67</sup> 2011 (3) SA 581 (SCA) para 12.

The Supreme Court of Appeal has thus endorsed the wide approach to enforcement as advocated by Otto in that any contractual remedies can be utilized by the credit provider. As indicated above the NCA prescribes a two-stage debt enforcement process being procedures prior to debt enforcement and debt procedures in court.<sup>68</sup>

### 3. COMPLIANCE WITH SECTION 129(1)(a)

As correctly stated by Van Heerden, the word ‘may’ used in section 129(1)(a) can be confusing.<sup>69</sup> The word “may” in its ordinary meaning would refer to something that is discretionary as opposed to something that is compulsory. This does not create legal certainty in respect of debt collection in terms of the National Credit Act. Section 129(1)(b) emphasizes the fact that a notice as contemplated in section 129(1)(a) must be sent to the consumer before any legal proceedings to enforce can commence.<sup>70</sup> This point is further emphasized by section 130(1) of the National Credit Act which provides as follows:

“ a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and—

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

As correctly found in *Nedbank Ltd and Others v The National Credit Regulator and Another*, if section 129(1)(a), section 129(1)(b) and section 130(1) is read together it is clear that the legislature’s intention was that a credit provider must comply with section

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<sup>68</sup> Van Heerden in Scholtz *et al Guide to the National Credit Act* (2008 et seq) 12-4.

<sup>69</sup> Van Heerden in Scholtz *et al Guide to the National Credit Act* (2008 et seq) 12-9. Also confirmed by Van Heerden & Boraime: *The Conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act* (2011) 23 SA Merc LJ.

<sup>70</sup> *Nedbank Ltd and others v The National Credit Regulator and Another* 2011 (3) SA 581 (SCA).

129(1)(a) in order to institute legal proceedings to enforce the agreement.<sup>71</sup> The credit provider must plead in its particulars of claim that it has complied with section 129 as in the Northern Cape High Court in *Beets v Swanepoel* it was held that the section 129(1)(a) notice completes part of the credit provider's cause of action.<sup>72</sup> The Court held that in instances where a claim is based on statutory provisions and the statute contains an express prohibition, the plaintiff must prove such facts as are necessary to rely on the prohibition failing which, the particulars of claim would not disclose a cause of action.<sup>73</sup> It was the Court's view that the same principle applies to statutory peremptory pre-enforcement notices.<sup>74</sup>

It must be noted that unilateral termination of a credit agreement does not suspend or terminate any residual obligations under the agreement.<sup>75</sup>

#### **4. PURPOSE AND CONTENT OF SECTION 129(1)(a) NOTICE**

It is imperative to establish what the purpose of a section 129(1)(a) notice is. Section 129(1)(a) gives some insight into its purpose by providing that the notice should 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.<sup>76</sup>

From the section itself it is clear that its ultimate purpose is to either bring the payments under the agreement up to date or to resolve any dispute between the parties under the agreement prior to costly debt enforcement. The section proposes various methods of how this can be accomplished. In *Nedbank & Others v National Credit Regulator and Another* the purpose of a section 129(1)(a) notice was explained by Malan JA where he indicated that the notice required by section 129(1)(a) refers to a specific credit

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<sup>71</sup> 2011 (3) SA 581 (SCA) para 14.

<sup>72</sup> [2010] JOL 26422 (NC) para 19. Also confirmed in *Sebola & Another v Standard Bank of South Africa LTD & Another* 2012 (5) SA 142 (CC) para 77.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Section 123(6) of the National Credit Act 34 of 2005.

<sup>76</sup> Section 129(1)(a) of the National Credit Act 34 of 2005.

agreement in respect of which the consumer is in default. It must 'propose' that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud 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.<sup>77</sup> The section 129(1)(a) notice deals with one credit agreement only and seeks to bring about a consensual resolution relating to that agreement.<sup>78</sup> It does not contemplate a general debt restructuring as envisaged by sections 86 and 87.<sup>79</sup>

The purpose as defined in the section as well as endorsed by the SCA relates only to a specific credit agreement and not to debt restructuring in general.<sup>80</sup> The SCA further held in *Nedbank & Others v National Credit Regulator and Another*, that section 129(1)(b)(i) makes it clear that the notice in terms of section 129(1)(a) is a necessary 'step' before legal proceedings can commence.<sup>81</sup> The Supreme Court of Appeal further held that by giving the notice envisaged by section 129(1)(a) the credit provider 'has proceeded to take the steps contemplated in section 129 to enforce that agreement': a debt review relating to that specific agreement is thereafter excluded.<sup>82</sup>

Van Heerden and Otto submit that the section 129 notice should indicate that if the consumer fails to respond to the notice or respond by rejecting the credit provider's proposals within ten (10) working days, then debt enforcement will follow if the consumer is in default under the credit agreement for a period of at least twenty (20) business days.<sup>83</sup> This is in line with *Nedbank Ltd and Others v The National Credit Regulator and Another* which confirmed that a notice in terms of section 129(1)(a) must

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<sup>77</sup> *Nedbank & Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) para 9.

<sup>78</sup> *Nedbank & Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) para 10.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> 2011 (3) SA 581 (SCA) para 14.

<sup>82</sup> *Nedbank & Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) para 14.

<sup>83</sup> Van Heerden and Otto: *Debt enforcement in terms of the National Credit Act 34 of 2005* 2007 TSAR 666.

be sent to the consumer before debt enforcement can commence.<sup>84</sup> Van Heerden and Otto also submit that the notice can be incorporated into a letter of demand.<sup>85</sup>

## 5. TIME LIMITS

Section 129 itself is silent on the available time frames in respect of the notice and subsequent commencement of litigation.<sup>86</sup> Time limits appear when one considers section 129(1)(b)(ii) read with section 130(1)(a). Section 130 requires the consumer to be in default under the agreement for at least a period of twenty (20) days<sup>87</sup> and ten (10) days<sup>88</sup> should have lapsed since the notice as contemplated in section 129(1)(a) has been delivered to the consumer before a credit provider can approach a court for the enforcement of the credit agreement.

Section 130(1)(b) qualifies the time limits as stated in section 130(1)(a) in that a credit provider can only approach a court if the consumer has not responded to the section 129(1)(a) notice, or responded to the notice by rejecting the credit provider's proposals.<sup>89</sup> In practice it is submitted that it will usually be the former.

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<sup>84</sup> 2011 (3) SA 581 (SCA) para 14.

<sup>85</sup> Van Heerden and Otto: *Debt enforcement in terms of the National Credit Act 34 of 2005* (2007) TSAR 666.

<sup>86</sup> Van Heerden and Otto: *Debt enforcement in terms of the National Credit Act 34 of 2005* (2007) TSAR 661.

<sup>87</sup> Section 2(5) sets out how these days must be calculated: When a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by—

(a) excluding the day on which the first such event occurs;

(b) including the day on or by which the second event is to occur; and

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

<sup>88</sup> *Ibid.*

<sup>89</sup> The Court held in *Standard Bank v Rockhill* [2010] JOL 25175 (GSJ): “Clearly, the National Credit Act has as its primary purpose the protection of consumers and it sets a minimum standard for protection. However, this does not preclude parties from incorporating into their agreements additional protection for the consumer.” It is therefore possible that the credit provider can afford the consumer more protection in respect of an extended period to respond to the notice. The parties cannot agree to less protection for the consumer than the minimum standard as set out in s 130(1)(a).

## 6. METHOD OF NOTIFICATION

Section 129, in its current form, does not disclose the manner in which the notice as contemplated in terms of section 129(1)(a) should be delivered.<sup>90</sup> “Delivered” is not defined in the Act, but is defined in the regulations. In the matter of *Munien v BMW Financial Service (SA) (Pty) Ltd* Wallis J held that the Minister has prescribed the manner of delivering documents to a consumer in terms of the Act and that the method of delivery must be in accordance with the provisions of the definition of "delivered" in the regulations rather than in terms of section 65(2).<sup>91</sup>

Section 65(1) imposes the obligation on the credit provider that every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any. Section 65(2) contains the general provisions relating to delivery of documents in terms of the National Credit Act and provides that if no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must make the document available to the consumer through one or more of the following mechanisms:

- (a) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer’s expense, or
- (b) by ordinary mail;
- (c) by fax;
- (d) by email; or
- (e) by printable web-page;

Section 65(2)(b) provides that a document must be delivered to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph section 65(2)(a). As can be seen from the section, no reference is made to registered mail but registered mail as a method of delivery is included in the regulations of the National Credit Act. In Regulation 1 ‘delivered’ is defined as the sending a document by

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<sup>90</sup> Van Heerden in Scholtz *et al Guide to the National Credit Act* (2008 et seq) 12-13.

<sup>91</sup> [2009] JOL 23387 (KZD) para 12.

hand, fax, email or registered mail to an address chosen in the agreement by the proposed recipient.

From the definition in the regulations it is clear that ordinary mail is excluded and registered mail included. However the regulations cannot be used to interpret the Act.<sup>92</sup> Section 168 is the only other section in the National Credit Act that deals with service of documents. It provides that unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either delivered to that person or sent by registered mail to that person's last known address.<sup>93</sup>

The problem regarding ordinary post and registered post was addressed in the matter of *Rossouw v First Rand Bank Ltd* where Cloete JA held that in the matter before the court the sending of the section 129(1)(a) notice would be both necessary and sufficient.<sup>94</sup> The Supreme Court of Appeal went further to say that where a consumer, the appellants in this matter, had chosen any other method of delivery as contained in section 65(2), the credit provider will have to comply by sending the section 129(1)(a) notice to the consumer via the consumer's preferred method as well as per registered post.<sup>95</sup>

In the matter of *Sebola & Another v Standard Bank of South Africa Ltd & Another* the court referred to *Rossouw* and held that the Supreme Court of Appeal's interpretation of the relevant sections of the National Credit Act does not give enough weight to the provisions contained in section 129 and section 130.<sup>96</sup> The Constitutional Court held that where a notice has been posted, mere dispatch is not enough.<sup>97</sup> Judge Cameron

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<sup>92</sup> In *Rossouw and Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) para 27 it was held that: "For these reasons, contrary to the views of the court below, I do not think that any regard should be had to the definition of the word 'delivered' in the regulations in interpreting ss 129(1)(a) and 130(1). As I see it, the definition does not purport to contain a 'prescribed manner' for delivery, and the answer must lie in the provisions of the Act itself."

<sup>93</sup> Section 168 of the National Credit Act.

<sup>94</sup> 2010 (6) SA 439 (SCA) para 57.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Sebola & Another v Standard Bank of South Africa LTD & Another* 2012 (5) SA 142 (CC) para 72.

<sup>97</sup> 2012 (5) SA 142 (CC) para 75.

considers the risk of non-delivery of the notice by ordinary mail to be too great.<sup>98</sup> Even though registered post can also go astray, the Constitutional Court held that there is a high degree of probability that most of them are delivered.<sup>99</sup> The National Credit Amendment Act<sup>100</sup>, which has yet to come in operation, has addressed the shortcomings of the National Credit Act in that the following addition was made to section 129:

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

When the Amendment Act comes into operation, there will only be two manners of delivery, being registered post or to an adult person at the address as chosen by the consumer. The consumer will be compelled to exercise his right of choice in a written format.

## **7. ADDRESS OF DELIVERY & *DOMICILIUM CITANDI ET EXECUTANDI***

The address for delivery of the section 129(1)(a) notice is governed by section 96(1) which provides that whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, the National Credit Act or any other law, the party giving notice must deliver that notice to the other party at the address of that other party as set out in the agreement or the address most recently provided by the recipient in accordance with section 96(2).<sup>101</sup>

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<sup>98</sup> *Sebola & Another v Standard Bank of South Africa LTD & Another* 2012 (5) SA 142 (CC) para 75.

<sup>99</sup> *Ibid.*

<sup>100</sup> Act 19 of 2014.

<sup>101</sup> Section 96(1)(a) and (b) of the National Credit Act.

Van Heerden & Otto submit that the nature of a section 129(1)(a) notice qualifies it to be a legal notice as contemplated in section 96(1) of the National Credit Act.<sup>102</sup> The consumer must choose an address that will be contained in the credit agreement.<sup>103</sup> It is possible for a party to an agreement to change their chosen address by giving written notice thereof to the other party.<sup>104</sup> The party that wants to deliver a notice to the other party is compelled to use the address in the agreement<sup>105</sup> or the most recently provided address for the other party.<sup>106</sup> In the matter of *Absa Bank Ltd v Proschaka t/a Bianca Cara Interiors* it was held that a notice as contemplated in section 129(1)(a) must be sent to the correct and specific address as chosen by the consumer in the credit agreement.<sup>107</sup> Sections 96, 129, 130 and the entire National Credit Act is silent on the issue of a *domicilium* address – whether it is permitted or prohibited.<sup>108</sup> Since there is no prohibition<sup>109</sup> on a provision in the credit agreement that provide for a *domicilium* address, Van Heerden and Otto submit that the parties may contractually agree to *domicilium* addresses.<sup>110</sup>

## 8. CONSUMERS WHO MUST RECEIVE NOTICE

Section 129 only refers to the notice that should be delivered to the consumer. It does not specify the type of consumer. The National Credit Act applies to natural persons as well as juristic persons.<sup>111</sup> The application of the National Credit Act to juristic persons is however limited. Where a specific credit agreement, in respect of which the consumer is a juristic person, is not excluded under section 4 of the National Credit Act, one need to look at the possibility that the application of the National Credit Act might be

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<sup>102</sup> Van Heerden and Otto: *Debt enforcement in terms of the National Credit Act 34 of 2005* 2007 TSAR 664.

<sup>103</sup> Section 96(1)(a) of the National Credit Act.

<sup>104</sup> Section 96(2) of the National Credit Act.

<sup>105</sup> Section 96(1)(a) of the National Credit Act.

<sup>106</sup> Section 96(1)(b) of the National Credit Act.

<sup>107</sup> 2009 (2) SA 512 (D) para 55.

<sup>108</sup> Van Heerden in Scholtz *et al Guide to the National Credit Act* (2008 et seq) 12-37

<sup>109</sup> Section 90 of the National Credit Act.

<sup>110</sup> Van Heerden and Otto: *Debt enforcement in terms of the National Credit Act 34 of 2005* (2007) TSAR 664.

<sup>111</sup> Section 4 of the National Credit Act 34 of 2005.

limited in terms of section 6 of the National Credit Act.<sup>112</sup> Section 4 read with section 6 of the National Credit Act<sup>113</sup> sets out the application of the National Credit Act and provides as follows:

- “(1) this Act applies to every credit agreement between parties at arm’s length and made, within, or having an effect within, the Republic, except –
- (a) a credit agreement in terms of which the consumer is –
    - (i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of Section 7(1);
    - (ii) the state; or
    - (iii) an organ of state.”

Section 6 however does not exclude Chapter 6 of the National Credit Act.<sup>114</sup> Section 129 and section 130 forms part of Chapter 6 and it can therefore not be said that the section 129(1)(a) notice should not be sent to a consumer that is a juristic person.<sup>115</sup>

## 9. THE NEED FOR THE NOTICE TO PHYSICALLY REACH THE CONSUMER

There have been numerous debates about this very issue. Some of the problems were ironed out by decisions of the courts. In *Rossouw v First Rand Bank Ltd* Maya JA held that it appears that the legislature’s grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer’s shoulders.<sup>116</sup> With every choice lies a responsibility and it is after all within a consumer’s sole knowledge which means of communication will reasonably ensure delivery to him.<sup>117</sup> The Court thus indicated that it is entirely fair in the

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<sup>112</sup> Section 6 provides that: “The following provisions of this Act do not apply to the credit agreement or proposed credit agreement in terms of which the consumer is a juristic person:

- (a) Chapter 4 – Parts C & D;
- (b) Chapter 5 – Part A – Section 89(2)(b);
- (c) Chapter 5 – Part A – Section 90(2)(o); and
- (d) Chapter 5 – Part C.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> This point is also submitted by Van Heerden & Otto *Debt enforcement in terms of the National Credit Act 34 of 2005* (2007) TSAR 667.

<sup>116</sup> 2010 (6) SA 439 (SCA) para 32.

<sup>117</sup> *Ibid.*

circumstances to conclude from the Legislature's express language in section 65(2) that it considered dispatch of a notice in the manner chosen by the appellants sufficient for purposes of section 129(1)(a) and that actual receipt is the consumer's responsibility.<sup>118</sup>

Maya JA further held that it was beyond doubt that the Legislature was satisfied that sending a document by registered mail is proper delivery.<sup>119</sup> The Constitutional Court in *Sebola & Another v Standard Bank of South Africa Ltd & Another*<sup>120</sup> also considered the section 129 notice. Judge Cameron, for the purpose of notices sent via registered post, distinguished between uncontested and contested matters and held the requirement that a credit provider provide notice in terms of section 129(1)(a) to the consumer must be understood in conjunction with section 130, which requires delivery of the notice.<sup>121</sup> The statute, though giving no clear meaning to “deliver”, requires that the credit provider seeking to enforce a credit agreement must aver and prove that the notice was delivered to the consumer.<sup>122</sup> Where the credit provider posts the notice, proof of registered dispatch to the consumer's address, together with proof that the notice had reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery.<sup>123</sup> If in contested proceedings the consumer avers that the notice did not reach her, the court must establish the truth of the claim.<sup>124</sup> It can thus be summarized by saying that in uncontested matters, all that is required for the credit provider to establish sufficient proof of delivery is: proof of registered despatch and proof that the notice reached the correct post office.

In the Supreme Court of Appeal matter of *Absa Bank Ltd v Mkhize*<sup>125</sup> both *Rossouw* and *Sebola* were discussed and *Sebola* explained. From the above discussion of the *Sebola* judgment, it is clear that an additional step is required in addition to mere proof of despatch. *Sebola* had overruled *Rossouw* in that it placed an additional obligation on

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<sup>118</sup> *Ibid.*

<sup>119</sup> *Rossouw and Another v Firststrand Bank Ltd* 2010 (6) SA 439 (SCA) para 31.

<sup>120</sup> 2012 (5) SA 142 (CC).

<sup>121</sup> *Sebola & Another v Standard Bank of South Africa LTD & Another* 2012 (5) SA 142 (CC) para 87.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> [2013] JOL 31019 (SCA).

the credit provider<sup>126</sup>. The problem arises when a credit provider has complied with all the requirements, in *Sebola* and the Act, but the consumer chose to ignore the notifications by the relevant post office to collect the registered post addressed to him.

This problem has been addressed in the recent Constitutional Court decision in the matter of *Kubyana v Standard Bank of South Africa Ltd* that introduced the concept of the reasonable consumer into our credit law and wherein it was held that the Act prescribes obligations that credit providers must discharge in order to bring section 129 notices to the attention of consumers.<sup>127</sup> When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that<sup>128</sup>:

- a) the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;
- b) the Post Office issued a notification to the consumer that a registered item was available for his/her collection;
- c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary; and
- d) a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a)–(c), which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.<sup>129</sup>

From paragraph (d) above, it can be seen that this time round the Constitutional Court placed an obligation on the consumer to collect the notice, which would be the behaviour of a reasonable consumer. If the credit provider has complied with all the other steps in ensuring that the consumer received the notice, the onus rests on the

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<sup>126</sup> *Absa Bank Ltd v Mkhize and Another* [2013] JOL 31019 21.

<sup>127</sup> 2014 (4) BCLR 400 (CC) para 54.

<sup>128</sup> *Ibid.*

<sup>129</sup> 2014 (4) BCLR 400 (CC) para 54.

consumer to show good cause why the court should accept his version that he did not receive the notice alternatively in what aspect the credit provider failed in bringing the notice to his attention.

This *status quo* will remain largely intact when the National Credit Amendment Act<sup>130</sup> comes into effect. In terms of the newly included section 129(7) proof of delivery is satisfied by written confirmation by the postal service or its authorized agent, of delivery to the relevant post office or postal agency or the signature or identifying mark of the recipient. The amendment act does not include the “reasonable consumer” pre-requisite, but the judgment in *Kubyana* should suffice in protecting the credit provider against a *mala fide* consumer.

## 10. NON-COMPLIANCE WITH SECTION 129(1)(a)

Now that it has been established that a notice as contemplated in section 129(1)(a) is indeed compulsory and averments must be made in the credit providers particulars of claim regarding the compliance with section 129(1)(a) in order to complete the credit providers cause of action<sup>131</sup>, one must consider the consequences of non-compliance with section 129(1)(a).

Van Heerden & Boraine<sup>132</sup> identified the following instances that will constitute non-compliance with section 129(1)(a):<sup>133</sup>

- a) No section 129(1)(a) notice was delivered to the consumer prior to enforcement of the credit agreement;
- b) A notice in terms of section 129(1)(a) has been delivered to the incorrect address that differs from the address that the consumer provided in terms of section 96;<sup>134</sup>
- c) The section 129(1)(a) notice does not draw his default to the attention of the consumer, or propose that credit agreement be referred to any of the institutions as envisaged in section 129(1)(a) or fail to disclose that his proposition is aimed

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<sup>130</sup> 19 of 2014.

<sup>131</sup> *Beets v Swanepoel* [2010] JOL 26422 (NC).

<sup>132</sup> Van Heerden and Boraine: *The Conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act (2011)* 23 SA Merc LJ 52.

<sup>133</sup> This is not a closed list.

<sup>134</sup> *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D).

- at resolving a dispute regarding the agreement or to develop a plan to bring payments up to date;
- d) The section 129(1)(a) notice does not disclose the fact that the consumer is afforded ten (10) business day to respond to the notice, failing which enforcement will commence.
  - e) A court is approached prior to the expiry of the ten (10) day period as provided in section 130(1).<sup>135</sup>

Van Heerden & Boraine submit that if a section 129(1)(a) notice has been sent via registered post but has not been received by the consumer it would constitute compliance with section 129(1)(a).<sup>136</sup> However in light of *Sebola* mere dispatch of the section 129(1)(a) notice would not constitute delivery as proof of receipt by the correct post office is now also required.<sup>137</sup> In the judgment of *Kubyana* the Constitutional Court also required that the post office's notice must have reached the consumer.<sup>138</sup> Only if all these steps had been successfully executed will it constitute compliance with section 129(1)(a). From section 130(3) it is clear that a Court can only determine the matter if there has been proper compliance with section 129 by the credit provider. Section 130(3) provides that despite any provision of law or contract to the contrary, in any proceedings commenced in a Court in respect of a credit agreement to which the National Credit Act applies, the Court may determine the matter only if the Court is satisfied that in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with.

According to Van Heerden and Boraine it appears that a credit provider will not be able to commence enforcement of a credit agreement unless compliance with section 129(1)(a) has been pleaded in the credit provider's particulars of claim.<sup>139</sup> In *African*

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<sup>135</sup> *First Rand Bank v Dhlamini* [2010] JOL 25158 (GNP).

<sup>136</sup> Van Heerden and Boraine: *The Conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act* (2011) 23 SA Merc LJ 52.

<sup>137</sup> *Sebola & Another v Standard Bank of South Africa LTD & Another* 2012 (5) SA 142 (CC) para 87

<sup>138</sup> *Kubyana v Standard Bank of South Africa Ltd* 2014 (4) BCLR 400 (CC) para 54.

<sup>139</sup> Van Heerden and Boraine: *The Conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act* (2011) 23 SA Merc LJ 53. See also *Beets v Swanepoel* [2010] JOL 26422 (NC) para 19 and *Sebola & Another v Standard Bank of South Africa Ltd & Another* 2012 (5) SA 142 (CC) para 77.

*Bank v Myambo* is was held that by virtue of section 129(1)(b)(i) the credit provider's cause of action is not complete unless the section 129(1)(a) notice has been given.<sup>140</sup> In terms of section 130(4)(b) it seems that non-compliance with section 129 is not fatal. Section 130(4)(b) provides that in any proceedings contemplated in this section, if the court determines that the credit provider has not complied with the relevant provisions of the National Credit Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplate in subsection (3)(c) the court must adjourn the matter before it and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.

It is clear from section 130(4)(b) that the Court is compelled to adjourn the matter and direct the credit provider what steps need to be taken before the matter can be resumed where there has been any non-compliance with section 129(1)(a). It should be noted that the Court does not have a discretion if the court is convinced that there had been non-compliance with section 129(1)(a).<sup>141</sup> In *Standard Bank of South Africa Ltd v Rockhill* it was held that whilst non-compliance with section 129(1)(a) is an impediment to commencing any legal proceedings to enforce a credit agreement, it does not constitute a *bona fide* defence of the nature envisaged by rule 32(3)(b).<sup>142</sup> Once it is established at trial stage that the plaintiff has not complied with section 129(1)(a), the trial will be adjourned and an order made setting out the steps the plaintiff must complete before the trial can be resumed.<sup>143</sup>

Van Heerden & Borraine summarizes the position correctly by stating that there is a clear contradiction between the compulsory nature of the section 129(1)(a), as can be seen from section 129 read with section 130(1), and the relaxed approach by the legislature in section 130(4)(b) in respect of non-compliance with section 129(1)(a) and

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<sup>140</sup> 2010 (6) SA 298 (GNP) and Van Heerden and Borraine: *The Conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act (2011)* 23 SA Merc LJ 53.

<sup>141</sup> Van Heerden and Borraine: *The Conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act (2011)* 23 SA Merc LJ 54.

<sup>142</sup> *Standard Bank v Rockhill* 2010 (5) SA 252 (GSJ) para 17.

<sup>143</sup> *Ibid.*

the subsequent opportunity provided to the credit provider to rectify its mistake or omission.<sup>144</sup>

## 11. CONCLUSION

The notice in terms of section 129(1)(a) can be seen as the trigger for enforcement of a credit agreement in terms of section 130(1). The purpose of the section 129(1)(a) notice has been discussed in detail in this chapter but the crux of the content is dispute resolution prior to enforcement of the agreement which ultimately gives the consumer more protection and save the credit provider costly litigation. Previously a consumer was unable to include a credit agreement under a debt review application if the credit provider had started to enforce that credit agreement. Enforcement steps included steps in terms of section 129(1)(a). The position is now amended by the National Credit Amendment Act which provides that a credit agreement can only be excluded from debt review if the credit provider had started to enforce the credit agreement in terms of section 130.<sup>145</sup>

On its own, the word ‘may’ could cause some confusion, but as clearly indicated above it is a compulsory statutory pre-enforcement notice for enforcement proceedings to commence. Even though the word ‘enforce’ has led to numerous debates, the Supreme Court of Appeal has endorsed the wide approach which had been advocated by Otto which include all contractual remedies including but not limited to cancellation and enforcement of the aforesaid remedies through judicial means.<sup>146</sup>

Compliance with section 129(1)(a) is vital as any non-compliance with section 129(1)(a) read with section 130(1) will result in the matter not being able to proceed in Court, thus rendering the enforcement of the credit agreement temporarily impossible, subject to section 130(4)(b). Compliance with section 129(1)(a) must be pleaded in the credit provider’s particulars of claim in order for the credit provider’s cause of action to be completed. The legislature has through section 130(4)(b) enabled the credit provider, in

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<sup>144</sup> Van Heerden and Boraine: *The Conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act (2011)* 23 SA Merc LJ 54.

<sup>145</sup> Section 26 of the National Credit Amendment Act 19 of 2014.

<sup>146</sup> *Nedbank Ltd & Others v National Credit Regulator & Another* 2011 (3) SA 581 (SCA) para 12.

the event of non-compliance with section 129 and section 130, to comply with section 129(1)(a) and the court is not empowered to dismiss the credit provider's action based on the mere non-compliance with section 129(1)(a).

## **CHAPTER 3: ANALYSIS OF THE JUDGMENT IN *ABSA BANK LTD V MKHIZE AND ANOTHER***

### **1. INTRODUCTION**

The matter of *Absa Bank Ltd v Mkhize and Another (and two similar) cases*<sup>147</sup> addressed the issue of appealability of an order made in terms of section 130(4)(b) of the National Credit Act. In this chapter the judgment of the court *a quo* as well as the judgment in the Supreme Court of Appeal will be addressed. Only the parts of the judgment that deal with the appealability will be addressed.

### **2. *ABSA BANK LTD V MKHIZE AND ANOTHER AND OTHER RELEVANT CASES: FACTS***<sup>148</sup>

The matters of *Absa Bank Ltd v Mkhize and another and other relevant cases* were before Olsen AJ for default judgment on 12 June 2012, five (5) days after judgment was handed down in *Sebola v Standard Bank*<sup>149</sup>. As discussed in the previous chapter, Cameron J held in *Sebola* that in uncontested matters a credit provider would have proven proper delivery of the notice as contemplated in terms of section 129(1)(a) if the credit provider provide proof of registered dispatch and proof that the notice reached the correct post office.<sup>150</sup>

In all three matters before Olsen AJ, the notice had been dispatched to the correct address and received by the correct post office as required in *Sebola*, but the notices were thereafter returned to sender.<sup>151</sup> Olsen AJ held that due to the fact that the notice had been returned to sender that in all three matters there had not been proper compliance with section 129 and therefore the matters must be adjourned and an order made setting out the steps that Absa had to take before it would be allowed to re-enroll

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<sup>147</sup> [2013] JOL 31019 (SCA).

<sup>148</sup> 2012 (5) SA 574 (KZD).

<sup>149</sup> 2012 (5) SA 142 (CC).

<sup>150</sup> 2012 (5) SA 142 (CC) paras 75 and 76.

<sup>151</sup> 2012 (5) SA 574 (KZD) para 2.

the matters.<sup>152</sup> Olsen AJ proceeded to make an order in terms of Section 130(4)(b) which provided as follows:<sup>153</sup>

- a) The application for default judgment was postponed *sine die*.
- b) The plaintiff was afforded an opportunity to provide a notice to the defendant as contemplated in section 129(1) of the National Credit Act, 2005 through one or more of the mechanisms listed in paragraph 65(2)(a) of the National Credit Act, and also by registered post directed to the defendant's chosen address.
- c) Such notice had to, in addition to meeting the requirements of section 129(1)(a) of the Act, also draw the defendant's attention to:
  - (i) the fact that action had already been instituted against the defendant, the relevant case number and the fact that an application for default judgment has been postponed *sine die*;
  - (ii) the current amount of arrears;
  - (iii) the fact that the defendant's rights in terms of the Act, and in particular those contemplated by section 129(1)(a) of the Act, were unaffected by the fact that action has already been instituted.
- d) The plaintiff was granted leave to set down the application for default judgment on notice to the defendant, but was not allowed to do so until at least ten business days shall have elapsed since delivery of the notice referred to in paragraph (b) of this order; or if that date was not known, since the date by which the plaintiff contends that such delivery should have been effected.
- e) The application for default judgment should be accompanied by evidence on oath establishing to the best of the plaintiffs ability that the notice required by paragraph (b) of this order was provided to the defendant, and explaining the plaintiffs choice of mode of delivery of the notice and dealing with the matters referred to in section 130(1)(b) of the National Credit Act.

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<sup>152</sup> 2012 (5) SA 574 (KZD) para 60.

<sup>153</sup> 2012 (5) SA 574 (KZD) para 78.

It was further ordered that the costs incurred in producing the evidence placed before the court for the hearing on 28 June 2012, and all other costs incurred in connection with that hearing, should be paid by the plaintiff and save as aforesaid, the costs of the action to date are reserved for later.<sup>154</sup>

Olsen AJ complied with section 130(4)(b) in that he adjourned the matter and made an order setting out the steps to be taken by the credit provider before the matter can be re-enrolled.<sup>155</sup> Absa applied for leave to appeal against the aforementioned judgment. The High Court granted leave to appeal against the order of Olsen AJ to the Supreme Court of Appeal on the basis that another court could come to a different conclusion.<sup>156</sup> This was based on the judgment in the Western Cape High Court in the matter of *Nedbank v Binneman* where it was held that based on the available evidence before Griesel J, it showed that the letter in terms of section 129 had been sent by registered post to the mortgaged property and that it had actually reached the correct post office, *in casu* the Post Office in Kraaifontein.<sup>157</sup> Griesel J accordingly held that the plaintiff had duly provided notice to the consumer as required by section 129(1) of the National Credit Act and the risk of non-receipt therefore rests squarely with the defendant.<sup>158</sup> Griesel J proceeded to grant default judgment.<sup>159</sup> Olsen AJ also considered the conflict in the interpretation of *Sebola* and therefore granted leave to appeal in order for the Supreme Court of Appeal to settle the question.<sup>160</sup> Absa had contended that the Olsen AJ's interpretation of *Sebola* was wrong.<sup>161</sup> The Supreme Court of Appeal had different views as to the appealability of the order, hence a majority judgment delivered by Ponnann JA and a minority judgment by Lewis JA.

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<sup>154</sup> *Ibid.*

<sup>155</sup> *Absa Bank Ltd v Mkhize and another and other relevant cases* 2012 (5) SA 574 (KZD) para 59 – 60.

<sup>156</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 14.

<sup>157</sup> *Nedbank Ltd v Binneman* 2012 (5) SA 569 (WCC) para 8.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Nedbank Ltd v Binneman* 2012 (5) SA 569 (WCC) para 10.

<sup>160</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 14.

<sup>161</sup> [2013] JOL 31019 (SCA) para 1.

### 3. THE MAJORITY JUDGMENT

Ponnan JA held the view that the order of the court a quo in terms of section 130(4)(b) was not appealable.<sup>162</sup> He indicated that section 20(1) of the Supreme Court Act<sup>163</sup> gives a litigant the right of appeal to the Supreme Court of Appeal against the order or judgment of the High Court.<sup>164</sup> He also referred to the matter of *Zweni v Minister of Law and Order*<sup>165</sup> with regard to the requirements for an order / judgment to be susceptible to appeal.<sup>166</sup> In the matter of *Zweni* it was held that as a general rule a 'judgment or order' is a decision which has three attributes, the first being, the decision must be final in effect and not susceptible of alteration by the court *a quo*; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.<sup>167</sup> Ponnan JA held that if the matter had ended with prayer 1 of Olsen AJ's order, which postponed the default judgment applications *sine die*, it would not have been susceptible to appeal in terms of the requirements laid down in *Zweni*.<sup>168</sup> However paragraph 2 of the order of Olsen AJ had merely provided Absa with an opportunity to comply with section 129(1) of the National Credit Act by delivering the said notice to the consumer through one of the methods described in section 65(2) as well as via registered post to the defendant's chosen address.<sup>169</sup> Ponnan JA held that there appear to be strong indicators in the judgment of the High Court that the order that it proposed issuing was neither definitive of the rights of the parties nor intended to have the effect of disposing of any portion of the relief claimed in the main action.<sup>170</sup>

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<sup>162</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 54.

<sup>163</sup> 59 of 1959.

<sup>164</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 55.

<sup>165</sup> 1993 (1) SA 523 (A).

<sup>166</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 55.

<sup>167</sup> 1993 1 All SA 365 (A) 368.

<sup>168</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 56.

<sup>169</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 57.

<sup>170</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 58.

Ponnan JA subsequently held that paragraph 2 of the order by Olsen AJ, which seems to be the crux of the appeal, did not render the order, which would in terms of paragraph 1 of the order not have been appealable, appealable.<sup>171</sup> He was also of the view that the order of Olsen AJ is merely a direction from the Court on how the matter should proceed before the main action could be re-enrolled.<sup>172</sup> Ponnan JA referred in this regard to the judgment in the matter of *Pretoria Garrison Institutes v Danish Variety Products (Pty) Limited*<sup>173</sup> where it was held that:

“From the judgments of Wessels and Curlewis JJA, the principle emerges that a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to ‘dispose of any issue or any portion of the issue in the main action or suit or, which amounts, I think, to the same thing, unless it ‘irreparably anticipates or precludes some of the relief which would or might be given at the hearing’. The earlier judgments were interpreted in that case and a clear indication was given that regard should be had, not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right but to whether the costs bears directly upon and in that way affects the decision in the main suit”

Ponnan JA referred to the matter of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*<sup>174</sup> where the term interlocutory were discussed and it distinguished between different classes.<sup>175</sup> According to Harms JA in *Zweni*, this distinction is now of little consequence.<sup>176</sup>

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<sup>171</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 59.

<sup>172</sup> *Ibid.*

<sup>173</sup> 1948 (1) SA 839.

<sup>174</sup> 1977 (3) SA 534 (A).

<sup>175</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 60. In the matter of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* it was held that: “In a wide and general sense the term ‘interlocutory’ refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as ‘simple (or purely) interlocutory orders’ or interlocutory orders proper’, which do not...”

<sup>176</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 60. According to Harms JA “the practical implication of s 20(1) is that the real distinction is between a ‘judgment or order’ on the one hand and a decision (conveniently called a ‘ruling’) which is not. It is no longer necessary or conducive to clear thinking to consider, in this context, whether a decision is simple interlocutory order.”

Ponnan JA found that the High Court had not yet considered the merits of the matter but that the High Court merely gave directions as the court was not satisfied with service of the section 129(1)(a) notice on the consumer.<sup>177</sup> Olsen AJ, in his order, did not refuse default judgment or dispose of any issues in the main action, therefore the postponement and the directions in terms of Section 130(4)(b) does not amount to the dismissal of the credit providers action.<sup>178</sup> He indicated that the fact that the order by Olsen AJ most probably caused some inconvenience for Absa cannot be taken into account when the Court considers appealability of the matter.<sup>179</sup> Ponnan JA therefore held that if it were to be found that the order of Olsen AJ is indeed appealable, it would result in “fractional disposal” of matters and the subsequent “piecemeal hearing of appeals.”<sup>180</sup> He accordingly found that the order of Olsen AJ is not “a rule or order having effect of a final judgment” and that due to the aforesaid, the Supreme Court of Appeal lacks jurisdiction and the appeal was subsequently struck off the roll with costs.<sup>181</sup>

#### 4. MINORITY JUDGMENT

Lewis JA considered both *Sebola* and *Rossouw v First Rand Bank Ltd*<sup>182</sup>. Absa argued that it should not be precluded from obtaining default judgments in all three matters if it were to fail in respect of compliance with the steps as set out in the order of Olsen AJ.<sup>183</sup> Absa further argued that the judgment in *Sebola* had been misinterpreted and therefore the requirements had been imposed incorrectly on Absa.<sup>184</sup> Lewis AJ also considered the test in *Zweni* and found that, despite the fact that the requirements as

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<sup>177</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 62.

<sup>178</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 63.

<sup>179</sup> In *Zweni v Minister of Law and Order* 1993 (1) SA 533 B-C (with reference to South Cape Corporation) it was held that “the fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability”.

<sup>180</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 64 and *Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983 (4) SA 921.

<sup>181</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 65.

<sup>182</sup> 2010 (6) SA 439 (SCA).

<sup>183</sup> *Absa Bank Ltd v Mkhize and another (and two similar cases)* [2013] JOL 31019 (SCA) para 16.

<sup>184</sup> *Ibid.*

set out in the matter of *Zweni v the Minister of Law and Order*<sup>185</sup> has not been met in the present matter, it is not cast in stone or exhaustive.<sup>186</sup>

Lewis JA referred to the Supreme Court of Appeal's judgment in the matter of *Jacobs v Baumann N.O.* where the Supreme Court of Appeal held that in determining whether or not an order is final, one must have regard not only to its form but "predominantly, its effect".<sup>187</sup> Lewis JA held that if an order 'irreparably anticipates or precludes some relief which would or might be given at the hearing' it will be appealable."<sup>188</sup> On this issue Lewis JA referred to the matter of *NDPP v King* where it was held that the test is substance over form.<sup>189</sup> Lewis JA remarked as follows:

"In my view, the order in this matter rests on a final determination of an issue underlying the applications for default judgment: that default judgment cannot be given against a consumer where, although a section 129(1) notice has been sent by registered post, and received at the post office for the consumer's *domicilium*, if there is evidence to show that the notice was not collected by the consumer, the notice has in effect been given. But for that conclusion, the applications for default judgments would not have been postponed. The remainder of the order was based on irrevocable findings on Absa's obligations under the NCA. Unless those findings are overturned on appeal, Absa is bound to take the steps required by the order before exercising its right to obtain default judgment."<sup>190</sup>

One of the *amici curiae*, Mr. Pammenter, submitted that the order of Olsen AJ had merely a dilatory effect and would therefore not be appealable.<sup>191</sup> Mr. Pammenter further submitted that Absa was still free to proceed with default judgment under section 130(4)(b) of the National Credit Act.<sup>192</sup> Lewis JA criticized this point of view by stating that this argument does not take into account the fact that unless the steps in the Court order are complied with, Absa will not be able to re-enroll the default judgment

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<sup>185</sup> [1993] 1 All SA 365 (A).

<sup>186</sup> *Absa Bank Ltd v Mkhize and another (and two similar cases)* [2013] JOL 31019 (SCA) para 17.

<sup>187</sup> 2009 (5) SA 432 (SCA) para 18.

<sup>188</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 18.

<sup>189</sup> 2010 (2) SACR 146 (SCA) para 42.

<sup>190</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 19.

<sup>191</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 20.

<sup>192</sup> *Ibid.*

applications.<sup>193</sup> Lewis JA also referred to the matter of *SA Eagle Versekeringsmaatskappy Bpk v Harford*<sup>194</sup> where Harms AJA held that the decisive question was what the aims of the parties had been with the litigation and what the court had intended to achieve and whether the court has not intended to come to a provisional conclusion that could be amended, then its judgment was susceptible to appeal.<sup>195</sup> Lewis JA further held that Olsen AJ had reached very firm findings, as supposed to provisional conclusions, on what was required of the credit provider in order to enforce the credit agreements.<sup>196</sup>

The order of the court *a quo* had a very definite bearing on Absa in terms of the additional obligation that it imposed on Absa under the National Credit Act.<sup>197</sup> Lewis JA held that the order by Olsen AJ is susceptible to appeal because the finding was based on law and not only on the facts of the matter.<sup>198</sup> He confirmed that he considered the parts of Olsen AJ's order that imposed obligation on the credit provider, and the refusal to grant the relief sought in the default judgment applications until the order has been complied with, to be appealable.<sup>199</sup> Absa rendered an alternative argument that the Supreme Court of Appeal should develop the common law rules in respect of appealability, in terms of sections 39(2) and section 173 of the Constitution, but also in the interest of justice.<sup>200</sup> Lewis AJ did not consider the interest of justice test, specifically in light of the fact that the Supreme Court of Appeal had not yet adopted this test.<sup>201</sup> Furthermore he had found that Olsen AJ's order is appealable in terms of the tests that had already been adopted by the Supreme Court of Appeal.<sup>202</sup> Lewis JA proceeded to consider the merits and concluded that he would have dismissed the appeal on the merits.<sup>203</sup>

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<sup>193</sup> *Ibid.*

<sup>194</sup> 1992 (2) SA 786 (A) at 792 paras A – C.

<sup>195</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 21.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 22.

<sup>198</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 21.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 22.

<sup>201</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 23.

<sup>202</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 24.

<sup>203</sup> *Absa Bank Ltd v Mkhize & Another (and 2 similar cases)* [2013] JOL 31019 (SCA) para 53.

## CONCLUSION

The requirements for an order to be appealable have been discussed at length in chapter 1 of this dissertation. Through the investigation into the requirements it has been established that the key component is leave from either the court *a quo* or the Supreme Court of Appeal. The Constitutional Court has provided clarity on the appropriate test to be used, being the interest of justice. The Constitutional Court went further to establish factors that should be taken into account when determining the appealability of an interlocutory order. This includes the factors in the matter of *Zweni*. These factors are however not cast in stone.<sup>204</sup>

The background of section 129 and 130 is the enforcement procedure when a consumer does not honor his/her obligations under a credit agreement. It has been established that in order for a credit provider to enforce a credit agreement, it must comply with section 129 and 130. It must comply with both the pre-enforcement procedures, being the sending of the section 129 notice, and the enforcement procedures through judicial process. The crux of this dissertation lies in the non-compliance with the provisions of the National Credit Act and more specifically non-compliance with section 129(1)(a). It has been established through the Act, various case law and academic research that in the event of non-compliance, the court is compelled to adjourn the matter in terms of section 130(4)(b) and set out the steps that the credit provider must take in order to ensure compliance with the Act before the matter could be re-enrolled.

The central question in this dissertation was whether the section 130(4)(b) order is appealable. For an order to be appealable, it must be final in effect which was the central issue in the matter of *Mkhize* in the Supreme Court of Appeal. It was found that the order is not final in effect, as it is merely dilatory in nature. Once the credit provider has complied with the order, it is free to re-enroll the matter. The section 130(4)(b) order is both a rescue buoy for the credit provider in that the credit provider's action will

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<sup>204</sup> Farlam *et al Erasmus Superior Court Practice* (1993 et seq) A1-44A.

not be dismissed due to mere non-compliance with section 129(1)(a) and it serves as additional consumer protection to ensure that the consumer's rights remain in tact. The effect of a section 130(4)(b) order therefore differs from the dismissal of a summary judgment application in that after compliance with the section 130(4)(b) order, the credit provider will be able to re-enroll the matter. The dismissal of a summary judgment application is final in effect and forces the credit provider to proceed to trial.

It is submitted that Lewis JA is correct in saying that Olsen AJ, in the court *a quo* in *Mkhize*, reached very firm findings. It is submitted that in South Africa our focus on absolute consumer protection is misplaced. The recent decision by the Constitutional Court is a step in the right direction where the concept of a reasonable consumer was introduced. It is submitted that Maya JA is correct in the matter of *Rossouw v Firstrand Bank* in that the risk of non-receipt should rest on the shoulders of the consumer. Although the court is bound by section 130(3) to only determine the matter when it is satisfied that there has been compliance with section 129, the court must evaluate the facts of a matter carefully. By postponing the matter it will only increase the legal cost which cost will ultimately be granted against the already financially constraint consumer. The postponement is not only to the detriment of the consumer but also to the detriment of the credit provider for the reason that in period between the postponement and the next set down date, the consumer will in all likelihood continue to default on the credit agreement which increases the financial loss of the credit provider. In most cases, the credit provider will not recover the full outstanding debt together with the costs which is another indication that the enforcement process must be completed as soon as possible to minimize the damages of both the credit provider and the consumer. The consumer will be saddled with payment of the balance between the outstanding debt together with costs and the amount recovered through sale in execution.

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