

MINI DISSERTATION

**A CRITICAL ANALYSIS OF SECTION 129 (1) (a) OF THE NATIONAL
CREDIT ACT**

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**TO BE SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE
DEGREE**

MAGISTER LEGUM

(BUSINESS LAW)

AT THE

UNIVERSITY OF KWA-ZULU NATAL

SUPERVISOR : PROFESSOR T. WOKER

2014

DECLARATION

I, Viren Singh, declare that :

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TABLE OF CONTENTS

	CONTENTS	PAGE
1	INTRODUCTION	1
1 1	General introduction	1
1 2	Legislation prior to the NCA and brief historical overview	1
1 3	Provisions of the NCA relating to 'Reckless Lending' And 'Over-Indebtedness'	3
1 4	The purpose of section 129 of the NCA	4
1 5	Concluding Introductory Remarks	5
2	SECTION 129 OF THE NCA AND RELATED PROVISIONS	6
2 1	General introduction	6
2 2	Court decisions supporting the first approach	9
2 3	Court decisions supporting the second approach	10
2 4	Commentary by academics	11
2 5	Concluding remarks	12
3	<i>SEBOLA AND ANOTHER V STANDARD BANK OF SOUTH AFRICA LTD AND ANOTHER</i>	13
3 1	Facts of the case and submissions of the parties	13

3 2	The majority decision	14
3 3	Judgment of Zondo AJ	17
3 4	Concluding remarks	18
4	SUBSEQUENT COURT DECISIONS	19
4 1	Introductory remarks	19
4 2	<i>Nedbank Ltd v Binneman</i>	19
4 3	<i>Absa Bank Ltd v Mkhize; Absa Bank Ltd v Chetty ; Absa Bank Ltd v Mlipha</i>	19
4 4	<i>Absa Bank v Peterson</i>	20
4 5	<i>Balkind v Absa Bank</i>	21
4 6	Concluding remarks	21
5	<i>KUBYANA V STANDARD BANK OF SOUTH AFRICA LTD</i>	22
5 1	Facts of the case and submissions by the parties	22
5 2	Decision of the majority of the court	23
5 3	Decision of Jafta J	24
5 4	Concluding remarks	25
6	THE NATIONAL CREDIT AMENDMENT ACT	25
6 1	Introductory remarks	25

6 2	Background to the NCAA	26
6 3	The amendment	27
6 4	Concluding remarks	27
7	EXCURSUS INTO THE PURPOSE OF CONSUMER LEGISLATION AND SECTION 129 (1) (a) OF THE NATIONAL CREDIT ACT	28
7 1	Legislation	28
7 2	Purpose of the legislation as reflected in court decisions	28
7 3	Academic writers and commentators	31
8	CRITICAL ANALYSIS OF THE DEVELOPMENT OF OUR LAW IN RELATION TO THE SECTION 129 (1) NOTICE	32
8 1	Introductory remarks	32
8 2	Court decisions criticizing large financial institutions	33
8 3	Views of Penzhorn AJ	35
8 4	Critique of the NCAA	37
8 5	Interpretation of amendment	38
8 6	The amendment does not accord with the purposes of the NCA	42
8 7	Conclusion	51
	Bibliography	55

1 INTRODUCTION

1.1 General introduction

The National Credit Act¹ together with the Consumer Protection Act² have had a profound impact on the South African commercial and legal landscape.³ They introduce ‘substantial consumer protection measures’.⁴ The importance of the NCA must be seen against the exponential growth in the credit market over the years. By September 2012 consumer credit extension had ballooned to R 1.39 trillion and active consumers had more than tripled.⁵

1.2 Legislation prior to the NCA and brief historical overview

The implementation of the NCA on 1st June 2007 replaced the Credit Agreements Act,⁶ the Usury Act,⁷ and its Exemptions, as well as the Integration of Usury Laws Act,⁸ and amended various other statutes. The Usury Act regulated all money lending transactions, credit transactions and leasing transactions. It limited the amount of interest which could be charged. The credit provider could charge interest of 29% per annum for loans less than R 10 000.00 and 26% per annum for loans more than R 10 000.00. Section 15A, introduced in 1988, however, provided for an ‘Exemption’. The motivation for the Exemption was that ‘poor’ borrowers could not provide adequate security and so found it impossible to obtain loans. Lenders were reluctant to lend because the risk was too high. Some lenders indicated that they would lend if they could charge high interest rates.⁹ The first ‘Exemption Notice’ was introduced in 1992 and regulated loans of less than

¹ Act 34 of 2005 – hereafter the NCA.

² Act 68 of 2008 – hereafter the CPA.

³ Otto and Otto *‘The National Credit Act explained’* 2013 xi.

⁴ Woker “Why the need for consumer protection legislation? A look at some of the reasons behind promulgation of the National Credit Act and the Consumer Protection Act” 2010 *Obiter* 2017.

⁵ Draft National Credit Act Policy Framework 2013 GN 559 in GG 36504 of 2013-05-29 6.

⁶ Act 75 of 1980.

⁷ Act 73 of 1968.

⁸ Act 57 of 1996.

⁹ Woker “Access to redress for consumers : rights without redress are meaningless rights” – paper presented at the International Consumer Law Conference, Pretoria, September 2014.

R 6000.00¹⁰ This led to a mushrooming of the lending industry with many complaints of abuse.¹¹ The second 'Exemption Notice' was introduced in 1999 and applied to loans less than R 10 000.00¹² payable over thirty six months. It was more stringent than its predecessor.

However, there was still abuse such as the failure to supply consumers with proper information regarding the true cost of credit. In fact this was a major factor which led to the introduction of the NCA.¹³ In many instances, consumers were forced to enter into fresh loans to pay existing ones and were soon caught in a spiralling debt trap.

The Credit Agreements Act regulated the sale of goods on credit, that is, the buying of goods over a period of time. This was much more expensive than paying cash. The consumer needed to pay a deposit and pay for the goods in a set period of time. The Integration of Usury Laws Act extended the application of the Usury Act to the former 'homeland territories' such as Transkei and Venda. The Usury Act only protected consumers up to a principal debt of R 500 000.00 and the Credit Agreements Act had an upper ceiling of R 500 000.00 as regards the cash price of the goods. In some cases, both Acts applied jointly to credit agreements which created problems.¹⁴

Prior to the implementation of the NCA and the CPA, the system of consumer laws in South Africa was 'outdated, fragmented and predicated on principles contrary to the democratic system'.¹⁵ South Africa did not have comprehensive legislation that clearly spelled out the rights and obligations of all market participants.¹⁶

In addition, the following problem areas were identified:

¹⁰ Notice in terms of Section 15A of the Usury Act 73 of 1968 GN R 3451 in GG 14498 of 1992-12-31.

¹¹ Woker (Fn 9).

¹² Notice in terms of Section 15A of the Usury Act 73 of 1968 GN 713 in GG 20145 of 1999-06-01 as amended by GN 910 in GG 20307 of 1999-07-16.

¹³ Woker (Fn 4) 225.

¹⁴ Otto and Otto (Fn 3) 4.

¹⁵ The Department of Trade and Industry Draft Green Paper on the Consumer Policy Framework GN 1957 in GG 26774 6 of 2004-09-9.

¹⁶ Ibid.

- Ineffective consumer protection, particularly in relation to the 85% of the population in low income groups;
- High cost of credit and, for some areas, lack of access to credit;
- Rising levels of over-indebtedness; and
- Reckless behaviour by credit providers and exploitation of consumers by microlenders, intermediaries, debt collectors and debt administrators.¹⁷

In order to address the need for a comprehensive single statute relating to the credit industry, the Department of Trade and Industry, in August 2004, published a policy framework for consumer credit and subsequently in June 2005 tabled the National Credit Bill in Parliament.¹⁸ These developments resulted in the National Credit Act, Act 34 of 2005.

1 3 Provisions of the NCA relating to ‘Reckless Lending’ And ‘Over-Indebtedness’

The purpose of the NCA and the CPA is to provide a broad framework for consumer protection in South Africa in order to promote consistency, coherence and efficiency in the implementation of consumer laws.¹⁹ The purpose of the NCA is to ‘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’.²⁰ Woker confirms that ‘consumer protection legislation was introduced primarily to protect the interests of the poor, the vulnerable and the illiterate’.²¹ Specifically, section 3 (c) (ii) of the NCA aims at discouraging reckless credit granting by credit providers. Section 3 (g) proclaims that it is a purpose of the Act to address and prevent over-indebtedness of consumers and provides mechanisms for resolving over-indebtedness. These new concepts of reckless lending and over-indebtedness were introduced into the law by the NCA and are distinct consumer relief measures. Part D of the NCA deals with over-indebtedness and reckless credit. Section

¹⁷ Groen with input from Kelly-Louw “The National Credit Act and its regulations in the context of access to finance in South Africa” (2006) 12 (The Finmark Trust Report).

¹⁸ Roestoff and Renke “Debt Relief for Consumers – The Interaction between Insolvency and Consumer Protection Legislation (Part 1)” *Obiter* 2010 563.

¹⁹ The Department of Trade and Industry Draft Green Paper on the Consumer Policy Framework (Fn 15).

²⁰ Section 3 of the NCA.

²¹ Woker (Fn 9).

79 sets out the test to determine if a consumer is over-indebted. Section 80 defines reckless credit. In terms of section 83, the court may suspend a reckless credit agreement or even set aside all or part of the consumer's rights and obligations. Section 85 provides that in any court proceedings in which a credit agreement is being considered and the issue of over-indebtedness arises or is pleaded, the court may refer the matter to a debt counsellor or itself declare the consumer over-indebted and make any order provided for in section 87. Section 86 sets out the substantive and procedural aspects of a 'debt review' embarked upon by a consumer when she approaches a debt counsellor to commence the debt review process which would ultimately result in a rescheduling of debts, if she is found to be over-indebted. Section 87 sets out the powers of a court to rearrange a consumer's obligations. Section 88 (3) provides that a credit provider 'who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86 (b) (i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement...'. The debt review process was introduced to rehabilitate over-indebted consumers in order that they could once again contribute to the economy.²² The importance of the debt review process is established in that some 363 000 individuals have applied for debt counselling by the end of June 2012 and R8.5 billion has been distributed to credit providers through the process.²³

1 4 The purpose of section 129 of the NCA

The crucial importance of section 129 (1) read with section 130 of the NCA is that it is a 'gateway provision' to the enforcement process and a 'vital safety valve.'²⁴ The court stated:

'it has been described as a 'gateway' provision or a new prelitigation layer to the enforcement process. Although Section 129 (1) (a) says the credit provider 'may' draw the consumers default to his or her notice, Section 129 (1) (b) (i) precludes the commencement of legal proceedings unless notice is first given. So, in effect, the notice is compulsory. One of the means by which the legislation expressly provides

²² Draft National Credit Act Policy Review Framework (Fn 5) para 1.9.4.

²³ Ibid 5.

²⁴ *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) paras 39-40 (hereafter 'Sebola').

for its purposes to be pursued is through ‘consensual resolution of disputes arising from credit agreements’. Section 129 (1) is pivotal to this. It precludes legal enforcement of a debt before the credit provider has suggested to the consumer that he or she explore non-litigious ways to purge the default. Specifically, the notice must ‘propose’ that the defaulting consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, Consumer Court or ombud, with the intent that the parties resolve their dispute, or agree on a plan to remedy the default. The NCR characterised the notice as a vital safety valve designed to prevent unnecessary litigation and premature foreclosure on a consumers’ assets. For its part, SERI contended that the notice was so pivotal that the legislation demands that a consumer must actually be made aware of the options it sets out before legal proceedings can be commenced’.²⁵

Section 86 (2) of the NCA prevents a consumer from applying for ‘debt review’ once enforcement proceedings have already begun. The section 129 (1) notice therefore fulfils the vital role of providing a final opportunity to the consumer to make the necessary arrangements, including approaching a debt counsellor, failing which enforcement proceedings will be proceeded with. Although section 85 of the Act allows a court (before which there are proceedings relating to a credit agreement) to declare a consumer over-indebted or refer a consumer to a debt counsellor, our courts have adopted a fairly conservative approach and require the consumer to explain why she had not previously taken advantage of the provisions of section 86 or why she had failed to act upon receipt of the section 129 (1) notice.²⁶

1 5 Concluding Introductory Remarks

Section 129 appears to be straightforward. A notice must be delivered to the consumer. However, this seemingly innocuous section in the Act has led to numerous problems. Griesel J in *Papier* confirmed that it was ironic that a piece of legislation with such admirable intentions had become ‘a fertile ground for litigation’.²⁷ The controversy relating

²⁵ Ibid.

²⁶ *Standard Bank of South Africa Ltd v Hales* 2009 (3) SA 315 (D) 320 F-G.

²⁷ The National Credit Amendment Act 19 of 2014 – (hereafter NCAA).

to the proper interpretation of the notice requirement precipitated an amendment to the NCA which was assented to by the President on the 16th May 2014.²⁸

This dissertation will attempt to delve into whether the interpretation of some of our courts of section 129 (1) (a) and even the attempt by the legislature to clarify the true meaning of the notice requirement is in harmony with the purposes of the NCA. It will be submitted, notwithstanding widespread academic and judicial opinion to the contrary, that the interpretation attached and clarification provided does not meet the true objectives of the NCA. The NCA, whilst balancing the interests of the credit providers with that of consumers, is essentially a consumer protection piece of legislation, as stated by Naidu AJ in the Durban High Court.²⁹

This paper will attempt to illustrate that, philosophically and jurisprudentially, there are two groups of jurists who, because of their internal value systems and beliefs, take opposing views (both of which are equally justifiable in terms of legal jurisprudence) to argue their differing positions. It is submitted the tremendously powerful muscle of the large financial institutions enable them to lobby government effectively.

2 SECTION 129 OF THE NCA AND RELATED PROVISIONS

2 1 General introduction

Section 129 provides :

‘(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

²⁸ The National Credit Amendment Act 19 of 2014 – (hereafter NCA).

²⁹ *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) – (hereafter ‘*Prochaska*’).

- (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.'

As section 129 is to be read with section 130 (1) (a) of the NCA, it is necessary to also quote section 130 (1) (a) in full.

'Debt procedures in a Court. – (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 under that credit agreement for at least 20 business days and – At least 10 business days have elapsed since the credit provider delivered as notice to the consumer as contemplated in Section 86 (9), or section 129 (1), as the case may be;...'

Sections 65 , 96, 168 and regulation 1 of the NCA regulations³⁰ have also been utilised by the courts to assist in the interpretation of the notice requirement.

Section 65 (1) provides that a consumer has a right to receive documents, which must be delivered in the prescribed manner, if any. Section 65 (2) provides that the document may be served personally, by fax, email or by printable web page in the manner chosen by the consumer from the above options, if no method has been prescribed for the delivery of a particular document.

Section 96 reads as follows:

'Address for notice.-(1) 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

³⁰ GN R489 in GG 28864 of 2006-05-31.

agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at –

- (a) The address of that other party as set out in the agreement , unless paragraph (b) applies; or
- (b) The address most recently provided by the recipient in accordance with subsection (2)...

Section 168 of the Act provides that a document 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. The Minister of Trade and Industry is empowered to make regulations in terms of section 177 of the Act.

'Delivery' is not defined in the NCA despite it being used in numerous provisions. It is defined in the regulations as 'unless otherwise provided for ... sending a document by hand , by fax, by e-mail or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available the recipient's registered address.'

Prior to the decision in *Sebola*, our courts were at odds as to the proper interpretation of section 129 (1). The words 'draw the default to the notice of the consumer' and the word 'deliver' has sparked much judicial debate. Section 130 (1) (a) prescribes that the notice must be 'delivered' to the consumer. Section 65 refers to 'documents'. The word 'prescribed' is used in section 65 (1). Section 96 refers to a 'legal notice' and section 168 refers to 'a notice or document'. Section 168 provides that a person will have been properly 'served' when it has been 'either delivered' to that person or sent by registered post to that persons last known address. Accordingly the debate centres around whether the notice is a 'document' as referred to in section 65 (2). Does the word 'serve' in section 96 equate to 'bring to the attention of'? Can the definition of 'deliver' in the regulations be utilised to define the word 'deliver' in section 130 (1) (a)? Can sections 65, 96 and 168 assist in interpreting the word 'deliver' in section 130 (1) (a)?

Essentially, there are two schools of thought as to how the section 129 (1) (a) notice must be 'brought to the attention' of the consumer. The one view is that the notice must actually come to the attention of the consumer with the onus being on the credit provider to prove

this on a balance of probabilities, at any subsequent enforcement proceedings (hereafter the First Approach).

Broadly speaking, the second and contrary view is that mere dispatch of the notice, including by registered post, (in accordance with the 'greater is included in the lesser'³¹ principle) was all that was required to comply with the notice requirement. The risk of non-receipt falls on the consumer (hereafter the Second Approach).

2 2 Court decisions supporting the first approach

The court in *Prochaska* reasoned that the NCA represents 'a radical departure' from its predecessor, the Credit Agreements Act. Section 11 of the Credit Agreements Act merely provided for the handing over or postage by prepaid registered mail to the credit receiver of the prescribed notice. The court was of the view the purpose of the NCA was best served in holding that the notice must come to the actual attention of the consumer. Further, as the NCA was structured more for the protection of the consumer than the credit provider, 'a stricter interpretation' is warranted than in the case of previous legislation of this kind³² the court held:

'The words 'draw the default to the notice of the consumer', 'providing notice' and 'delivered a notice' in the context in which these appear in the previous paragraph, to my mind, cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires much more than the mere despatching of the notice contemplated by Section 129 (1) (a) to the consumer in the manner prescribed in the Act and the Regulations. The Credit provider is required, in my view, to bring the default to the attention of the consumer in a way which provides an assurance to a court, considering whether or not there has been proper compliance with the procedural requirements of ss 129 and 130, that default has indeed been drawn 'to the notice of the Consumer. 'Notice', according to the New Oxford Dictionary, means 'attention; observation'.³³

³¹ *Rossouw and Another v FirstRand Bank Ltd* 2010 (10) 439 (SCA) para 57.

³² *Prochaska* (Fn 29) 512 et seq.

³³ *Ibid.*

Murphy J in *First Rand Bank v Dhlamini*³⁴ commented that the purpose of section 129 (1) (a) read with section 3 (h), is to provide for a consistent and accessible system of consensual resolution of disputes and debt restructuring arising from credit agreements and that section 129 (1) (a) was deliberately designed to protect these aims. A non-rebuttable presumption of service or notice on mere dispatch of a notice in terms of section 129 would defeat these aims.³⁵ To avoid unnecessary hardship and to comply with the objects of the NCA, the court concluded that section 129 (1) (a) requires that a notice of any default by the consumer be brought to his or her actual attention, and that failure on the part of the credit provider to do so will bar the institution of legal proceedings, with the result that any action instituted before then will be premature.³⁶

2 3 Court decisions supporting the second approach

Wallis J in *Munien v BMW Financial Services and Another*³⁷ found that it was not necessary that the notice come to the actual attention of the consumer. He held that the method of delivery of the notice was as prescribed in the regulations to the NCA. He held that a section 129 (1) (a) notice is delivered if sent by registered post to the address chosen by the consumer. The sending of the document amounts to delivery and not the receipt thereof. He reasoned that it would be impossible for the sender to make sure that the notice had been received and that it would have been relatively easy, if the legislature required that the notice must actually come to the attention of the consumer, to have said so in express terms. He contended that although he considered the purpose of the NCA that could not alter the plain meaning of the word in the definition of 'delivered' (in the NCA regulations). The Court held that this interpretation was in line with interpretations of similar provisions in the NCA's predecessors.

³⁴ 2010 (4) SA 531 (GNP) – hereafter '*Dhlamini*'.

³⁵ Ibid para 20.

³⁶ Ibid para 31.

³⁷ 2010 (1) SA 549 (KZD) – hereafter '*Munien*'.

Gautschi AJ in *Starita v Absa Bank Ltd and Another*³⁸ agreed with Wallis J that the notice does not have to come to the actual attention of the consumer but differed in that he held that the answer to the question was to be found in sections 65 and 168 of the Act and that regulation 1 of the regulations to the Act could not be used to interpret the Act.

The Supreme Court of Appeals in *Rossouw*³⁹ also found that it was not necessary that the notice was actually received by the consumer, relying on the provisions of section 65 (2) rather than on regulation 1. The court found that the risk of non-receipt fell on the consumer.

The court in *Standard Bank of South Africa Ltd v Rockhill and Another*⁴⁰ also, following *Rossouw*, *Munien and Starita*, found that actual receipt of the notice is not required.

2 4 Commentary by academics

Otto⁴¹ disagrees with the conclusion reached in *Prochaska*. He argues that although the NCA must be interpreted anew, when other legislation is comparable with the Act, court decisions of the past dealing with similar issues may play a persuasive, perhaps even decisive, role. The word ‘notify’ as used in previous statutes is similar to the words ‘bring to the attention’ of the consumer. The leading case of *Marques vs Unibank Ltd*⁴² decided that a ‘section 11’ notice did not need to come to the attention of the consumer but it merely needed to be proven, by the credit grantor that it was sent or dispatched to the credit receiver. Otto criticises the decision in *Dhlamini* as it did not refer to decisions under previous legislation.

Kelly-Louw supports Otto’s approach. She calls the approaches of the Court in ‘*Prochaska*’ and ‘*Dhlamini*’ ‘stringent’ and ‘rigid’ approaches to the interpretation of

³⁸ 2010 (3) SA 443 (GSJ) – hereafter ‘*Starita*’.

³⁹ *Rossouw* (Fn 31).

⁴⁰ 2010 (5) SA 252 (GSJ).

⁴¹ JM Otto, “Notice in terms of the National Credit Act: Wholesale National Confusion. *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors; Munien v BMW Financial Services, Starita v Absa Bank Ltd; FirstRand Bank Ltd v Dhlamini*”, (2010) 22 SA Merc LJ 599.

⁴² 2001 (1) SA 145 (W).

section 129 (1) of the NCA. She argues that the approach of the Court in '*Munien*' and '*Starita*' are more 'sensible' and 'balanced' approaches.⁴³ Van Heerden and Coetzee also agree with the reasoning and motivation of Wallis J that 'delivery' for the purposes of section 65 (1) of the NCA means that the document has to be delivered in accordance with regulation 1.⁴⁴

Mills pointed out that the same conclusion (as contended for by Otto, Kelly-Louw, Van Heerden and Boraine) could have been reached via a much shorter route provided for in section 1 of the NCA which defines the word 'prescribe' to mean 'prescribed by regulation'.⁴⁵ Van Heerden and Boraine state that if the section 129 (1) (a) notice was delivered to a consumer in accordance with the prescription in regulation 1 of the NCA, for example, if it was sent by registered post but was not received by the consumer that such delivery by registered post does not amount to non-compliance.⁴⁶ On the other hand, Tennant takes quite the opposite view and endorses the conclusion reached in *Prochaska and Dhlamini*.⁴⁷

2 5 Concluding remarks

The brief discussion above illustrates the extent of the disagreement between the judges and even academics. It was inevitable that the Constitutional Court become involved in the proper interpretation of section 129 (1) (a). Regrettably the entire controversy was as a result of the 'inelegant drafting' of the NCA.⁴⁸ If the argument of some of the proponents of the second approach is to be accepted, it appears that the definition of 'deliver' in the regulations was an attempt to cure the *lacuna* in the Act itself. However, Gautschi AJ held that a clear answer to the 'interpretation question' was to be found in sections 65 and 168

⁴³ Kelly-Louw – "*The default notice as required by the National Credit Act 34 of 2005*" (2010) 22 SA Merc LJ 579 – 583.

⁴⁴ Van Heerden and Coetzee "*Marimuthu Munien v BMW Financial Services (SA) (Pty) Ltd* unreported case number 16103/08 (KZD)" PER 2009 (12) 4 333.

⁴⁵ Mills "National Credit Act 34 of 2005 – Section 129 Notice – dispatch or receipt?" 2009 De Rebus August 26.

⁴⁶ 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.

⁴⁷ Tennant, "A default notice under the NCA must come to the attention of the consumer unless the consumer is at fault" 2010 TSAR 852.

⁴⁸ *Sebola* (Fn 24) para 66.

of the Act and that regulation 1 of the regulations to the Act could not be used to interpret the Act.⁴⁹ In this argument, Gautschi AJ is supported by Kelly-Louw.⁵⁰ The *Sebola* judgment expressly disavows the reasoning of Wallis J on this point.⁵¹

3 SEBOLA AND ANOTHER V STANDARD BANK OF SOUTH AFRICA LTD AND ANOTHER

3.1 Facts of the case and submissions of the parties

Mr and Mrs Sebola, married in community of property, entered into a home loan agreement with Standard Bank. The Sebolas chose the mortgaged property as the address where notices and documents 'in any legal proceedings' should be served. In addition, they specified a post office box in North Riding, Johannesburg as the postal address to which 'letters, statements and notices may be delivered'. The Sebolas fell into arrears with their bond repayments. The bank's attorney sent a notice in terms of sections 129 (1) (a) by registered post. The applicants testified that they did not receive it. This was because the postal services diverted the notice to the wrong post office. The Sebolas attached to their papers a post office 'tracking and tracing' report, which reflected that the item intended for North Riding had been diverted instead to the Halfway House post office. The bank issued summons for the repayment of the full outstanding amount under the mortgage bond and an order declaring the property 'specifically executable'. Judgment was granted and the Sebolas sought to rescind the judgment.⁵²

The crisp issue was whether or not the Sebolas had a valid defence to the bank's claim. This depended on whether the bank had complied with sections 129 (1) (a) before instituting action. The High Court had decided that the credit provider's proof of postage to the correct (chosen) address constituted compliance for the purposes of section 129.⁵³

⁴⁹ *Starita* (Fn 32) 443.

⁵⁰ Kelly-Louw (Fn 43) 585.

⁵¹ *Sebola* (Fn 24) para 61.

⁵² *Sebola* (Fn 24) paras 4-7.

⁵³ *Ibid* para 10.

In an appeal to the Full Bench, the Court held itself bound to the SCA decision in *Rossouw*.⁵⁴

The *Sebolas* argued that the High Court erred by failing to adopt a purposive and contextual reading of section 129. Section 129 should have been interpreted constitutionally in the light of the Act's objectives. The Full Court's interpretation renders the protection the statute affords consumers nugatory. They argued that the decision in *Rossouw* adversely affects consumers who are not well versed in law.⁵⁵

The bank supported the reasoning in *Rossouw*. It contended that there is no reason to think that the decision does not promote the spirit of the Constitution and the objects of the Bill of Rights. The NCA seeks to achieve an equitable balance between the rights and responsibilities of consumers and credit providers.⁵⁶ The bank further argued that the *Sebolas*' interpretation would unjustifiably limit credit providers' right of access to court⁵⁷.

3 2 The majority decision

Cameron J wrote the majority judgment. The court agreed that a major overhaul of previous credit legislation was essential and that the statute 'represents a clean break from the past and bears very little resemblance to its predecessors'.⁵⁸ Cameron J confirmed that the main objective of the NCA is to protect consumers but agreed with the SCA that 'whilst the main object of the Act is to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked'.⁵⁹ The court agreed that the notice requirement in section 129 cannot be understood in isolation from section 130.⁶⁰ Section 129 focuses on the consumer to whom the credit provider must furnish notice and to whose notice the information must come. Section 130 tells the notice provider what must be done to fulfil the requirements of section 129, which is to 'deliver'

⁵⁴ Ibid para 14.

⁵⁵ Ibid para 17.

⁵⁶ Ibid para 21.

⁵⁷ Ibid para 21.

⁵⁸ Ibid para 39.

⁵⁹ Ibid para 40.

⁶⁰ Ibid para 52.

a notice.⁶¹ Section 129 requires that the notice must come to the attention of the consumer. The critical question is what the statute requires a credit provider to prove to establish this.⁶² It was accepted that one of the statute's core innovations (section 129 read with section 130) is significantly consumer friendly. These procedures are designed to help debtors to restructure their debts or find other relief 'before the guillotine of cancellation or judicial enforcement falls'.⁶³ Very importantly, the court agreed that access to debt counselling and extra judicial resolution will have the most potent impact when the guillotine is about to fall.⁶⁴

The court held that the regulations do not prescribe any method of 'delivery' as envisaged as section 130⁶⁵ and the regulations cannot be used to interpret the Act.⁶⁶ The meaning of the word 'delivered' must be determined by taking into account the high importance of the section 129 notice, against the background of the statute's other provisions that indicate how delivery of notices must be effected. These provisions are sections 65 (1) and (2), section 96 and section 168. The court noted that each of these provisions appeared to have some bearing on the meaning to be given to 'delivered' in section 130. Section 65 (2) is applicable where 'no method has been prescribed for the delivery of a particular document to the consumer'. Section 96 (1) applies because the notice envisaged in section 130 is a 'legal notice.' Section 65 (2) indicates that delivery entails making the document available to the consumer through one of the stipulated mechanisms, which would include registered mail.⁶⁷

Section 96 (1) requires delivery of legal notices 'at the addresses of the other parties as set out in the agreement. Section 168 provides that proof of dispatch by registered mail is clearly stated to be sufficient for the purposes of service. The court held, however, the special importance of the section 129 notice suggest that registered dispatch is not enough and that something more is required.

⁶¹ Ibid para 62.

⁶² Ibid paras 67-68.

⁶³ Ibid para 59.

⁶⁴ Ibid para 59-60.

⁶⁵ Ibid para 61.

⁶⁶ Ibid para 62.

⁶⁷ Ibid paras 67-68.

The quintessence of the reasoning of the Constitutional Court is reflected in the following analysis:

'These considerations drive me to conclude that the meaning of 'deliver' in Section 130 cannot be extracted by parsing the words of the statute. It must be found in a broader approach – by determining what a credit provider should be required to establish, on seeking enforcement of a credit agreement, by way of proof that the Section 129 notice in fact reached the consumer. As pointed out earlier, the statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible. Nor does it demand proof of delivery to an actual address. But given the high significance of the Section 129 notice, it seems to me that the credit provider must make averments that will satisfy the Court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer'.⁶⁸

In practical terms, the evidence required (of the 'track and trace' report) will ordinarily constitute adequate proof of delivery of the section 129 notice in terms of section 130. Where the credit provider seeks default judgment, the consumer's lack of opposition will entitle the court, from which enforcement is sought, to conclude the credit provider's averment that the notice reached the consumer is not contested. If, in contested proceedings, the consumer asserts that the notice went astray after reaching the post office, or was not collected, or not attended to once collected, the court must make a finding whether, despite the credit provider's proven efforts, the consumer's allegations are true and, if so, adjourn the proceedings in terms of section 130 (4) (b).⁶⁹

The court specifically disagreed with the conclusion reached in *Rossouw* that the risk of non-delivery falls on the consumer.

⁶⁸ Ibid para 74.

⁶⁹ Ibid paras 74-76 and para 87.

The court concluded, on the facts of the case, the bank did not deliver the notice as the statute obliged it to show that the notice actually reached the correct post office. The *Sebolas* were therefore entitled to the rescission of the judgment.

3 3 Judgment of Zondo AJ

Zondo AJ disagreed with the reasoning of the majority of the court. The minority court (Zondo AJ, Mogoeng CJ and Jafta J) held that the main judgment did not give proper weight to the fact that section 129 (1) (a) was enacted primarily for the benefit and protection of the consumer rather than that of the credit provider. The court said that any interpretation of the NCA must promote the purposes of the NCA and actual awareness promotes not only consumer protection but also the use of non-judicial mechanisms for resolving disputes which the NCA clearly requires.⁷⁰ The court commented that it cannot be that the correct construction of section 129 (1) (a) would place the consumer in a worse position than he was under common law. Under the common law, notice of breach of contract had to be conveyed to the mind of the debtor before it could be said that the creditor had given the debtor notice of such breach or notice of termination and therefore could cancel the agreement.⁷¹ The court held that purposive construction must be used in construing section 129 (1) (a). This is required in section 2 (1) of the NCA.⁷² Section 96 applies to the circumstances in the *Sebola* matter (that the notice must be 'delivered' to the other party). The court reasoned that that proposition leaves no room for a finding that a notice not in fact delivered to such party is good enough.⁷³ The provisions of section 168 are consistent with the provisions of section 96.⁷⁴ The court concluded that the construction of section 129 (1) (a) which entails that the credit provider must make the consumer aware of the default accords with the language of the provision, is fair, gives effect to the purpose of section 129 (1) (a) and gives appropriate weight to the legislature's intention to make cancellation and judicial enforcement of credit agreements measures of last resort.⁷⁵

⁷⁰ Ibid para 107.

⁷¹ Ibid para 122.

⁷² Ibid para 146.

⁷³ Ibid para 168.

⁷⁴ Ibid para 74.

⁷⁵ Ibid para 176.

3 4 Concluding remarks

It appears that many of the questions that emerged in the cases prior to *Sebola* were answered, even though there was disagreement amongst the judges of the Constitutional Court. Although Zondo AJ differed with the majority of the court, it appears that the weight of authority favours the view that section 129 (1) (a) must be read in conjunction with section 130 (1) (a). Notwithstanding the finding of Wallis J in *Munien*, it has been established authoritatively that Regulation 1 does not play a part in the interpretation of the Act. Sections 65, 96 and 168 play a part in assisting in interpreting the notice requirement, according to the decision of the majority of the court. These sections however must be balanced with the provisions of sections 129 and 130 read together and the importance and purpose of the notice requirement. Mere dispatch of a section 129 (1) (a) notice was insufficient. Zondo AJ argued persuasively that the notice must come to the actual attention of the consumer and Cameron J, in equally elegant reasoning, I submit, appears to have gone for the middle road between *Munien* and *Prochaska*. Generally, however, proof by the credit provider that the notice was sent to the correct post office, in the absence of any contrary intention, would satisfy a court that the notice was in fact delivered to the consumer. In the event that the consumer denies receipt of the notice then a factual finding would be made on the evidence. Zondo AJ found that sections 96 and 168 are in line with the conclusion that he reached. I submit that the approach adopted by Cameron J attempted to balance the interests of the credit providers and consumers. The approach of Zondo AJ was, as the NCA was primarily a consumer piece of legislation, that fact must be given primacy and the law required that the notice must come to the actual attention of the consumer.

Unfortunately, notwithstanding the highest court in the land having pronounced on the issue the controversy was not finally resolved.

4 SUBSEQUENT COURT DECISIONS.

4 1 Introductory remarks

Within a week of the handing down of the *Sebola* decision, *Nedbank Ltd v Aneline Binneman and 12 Similar Cases*⁷⁶ served before Griesel J. Shortly thereafter the Durban High Court was seized with similar matters.

4 2 *Nedbank Ltd v Binneman*

A large number of applications for default judgment came before the court. Most of them were based on mortgage bonds registered over immovable properties which constituted the homes of the respective defendants. The representatives of the bank were able to provide relevant 'track and trace' reports. However it was established that the notices had been 'returned to sender'. The question that arose was whether, in those circumstances, the credit provider would be entitled to default judgment.⁷⁷

The Court held that the principle established in *Munien* and *Rossouw* was not overruled by the judgment of the majority in *Sebola*.⁷⁸ The Court held that all *Sebola* did was to clarify that dispatch *per se* was insufficient. There must in addition, be proof that the notice reached the appropriate post office. The court held that the bank had duly provided notice to the consumer as required by section 129 (1). The risk of non-receipt rested squarely with the defendants.⁷⁹

4 3 *Absa Bank Ltd v Mkhize; Absa Bank Ltd v Chetty ; Absa Bank Ltd v Mliphha*⁸⁰

Absa Bank applied for default judgment in four applications in respect of home loan mortgage bonds. The 'track and trace' reports reveal that the notice had in fact reached

⁷⁶ Unreported case number 724/2011 (WCC) decided on 21st June 2012 – (hereafter '*Binneman*').

⁷⁷ *Ibid* para 77.

⁷⁸ *Ibid* para 6.

⁷⁹ *Ibid* para 8.

⁸⁰ Case Number 4084/2012, 4115/2012, 3882/2012 [2012] ZAKZDHC 38 (6th July 2012) – (hereafter '*Mkhize*').

the correct post office but the registered item had nevertheless had returned 'unclaimed'. The bank argued that proof of delivery to the correct post office was sufficient, in the light of the majority decision in *Sebola*. Evidence was provided to the court that during the period January to May 2012, Absa Bank sent 1392 letters (by registered post) to consumers in respect of unsecured loans, of which 63.6% were returned. Of the 3300 registered letters sent in respect of unsecured loans, 70% of the letters were returned. Of the 19 555 letters sent in respect of credit cards, 70% were returned.⁸¹ The court held that it was unable to reach a conclusion that the majority judgment in *Sebola* 'sanctions this Court' ignoring conclusive evidence that the section 129 notice did not reach either the consumer or the consumer's address.⁸² The court states that the standard set by section 129 (1) of the Act is that there must be actual notice to the consumer. The quantum of proof necessary would ordinarily be satisfied by the 'track and trace' report. There is a *caveat*. Positive proof of the fact that the notice did not reach the consumer trumps any conclusion which suggests that the notice ought to have reached the consumer. The court held that the *Sebola* decision did not endorse the decision in *Rossouw*.⁸³ Olsen AJ specifically rejected the contention that the Constitutional Court endorsed the decision of *Rossouw* that the risk of non-delivery lies with the consumer.⁸⁴

4 4 Absa Bank v Peterson⁸⁵

This court held that the notice requirement is satisfied by dispatch of the notice by registered mail and its delivery to the correct post office as shown by the 'track and trace' report. Somewhat surprisingly, it also held that it had enquired into the materiality of the defendant (Peterson) not having received the section 129 notice and concluded he could not have been able to profitably use any of the options section 129 provide.⁸⁶

⁸¹ Ibid para 26.

⁸² Ibid para 51.

⁸³ Ibid para 53.

⁸⁴ Ibid para 58.

⁸⁵ 2013 (1) SA 481 (ECC).

⁸⁶ Ibid paras 25 and 29.

4 5 *Balkind v Absa Bank*⁸⁷

It was common cause that the section 129 letter was sent by registered mail to the applicant's chosen domicilium address. The 'track and trace' report showed that it had reached the correct post office, but the notice did not come to the applicant's attention because he had moved from the domicilium address without notifying the respondent thereof. The issue was whether these facts constituted compliance with the requirements set out in *Sebola*. The court held that its interpretation of *Sebola* required that the notice had to be brought to the attention of or had reached the consumer and required that proof thereof be established on a balance of probability.⁸⁸

4 6 Concluding remarks

The judgment of Griesel J set the cat amongst the pigeons. The Learned Judge was, however, clearly wrong in stating that *Sebola* had not overruled *Rossouw* to the extent that it held the risk of non-delivery rested on the consumer. *Sebola* had expressly made a finding rejecting that contention in *Rossouw*. The weight of judicial authority including decisions in *Mkhize, Balkind, Standard Bank v Van Vuuren and Several Other Matters*⁸⁹ favour the view that the gravamen of the *Sebola* judgment was that the notice must come to the attention of the consumer and that ordinarily and in the absence of any contrary indication sufficient proof of delivery shall be contained in the 'track and trace' report indicating that the notice had been delivered to the correct post office (especially in the absence of any opposition to the application for default judgement made by the credit provider). With respect, it appears that Griesel J's judgment is a criticism of the *Sebola* judgment. However, its effect was that the matter returned to the Constitutional Court for clarity.

⁸⁷ 2013 (2) SA 486 (ECG).

⁸⁸ *Ibid* para 26 *et seq.*

⁸⁹ Unreported case number 32874/2012 (GSJ) para 6-7.

5 KUBYANA V STANDARD BANK OF SOUTH AFRICA LTD⁹⁰

5.1 Facts of the case and submissions by the parties

Following the different interpretations of the ‘*Sebola*’ judgment it again became necessary for the Constitutional Court to provide direction. This decision followed a full trial in the South Gauteng High Court in which the court granted judgment in favour of the bank. Evidence showed that the bank had sent Mr Kubyana a notice in terms of section 129, which notice was sent to the correct post office in (according to the ‘track and trace’ report) which was the Pretoria North Post Office. The post office sent a notification to the address nominated by Mr Kubyana that an item had been sent by registered mail and was awaiting his collection. Notwithstanding a second notification given seven days later, Mr Kubyana did not respond. The bank also contacted the defendant on numerous occasions both telephonically and in person, to no avail.⁹¹ Mr Kubyana did not give evidence in the trial and the Constitutional Court found that the dispute was fully ventilated in the High Court before Ledwaba J.⁹² The High Court concluded that Mr Kubyana had a duty to explain why the notice did not reach him notwithstanding the bank’s efforts, and that his failure to do so had to count against him.⁹³

In the Constitutional Court, Mr Kubyana contended, as the registered post was returned to the credit provider ‘unclaimed’, this showed that there had not been proper compliance with the Act as the notice had not come to the attention of the consumer for whom it was intended. It was argued that the fact that the section 129 notice was returned to the bank ‘constituted an indication contradicting the inference of proper delivery’.⁹⁴ The issue before the court was what must a credit provider do to satisfy a court that it has discharged its obligation to effect proper delivery of a statutory notice.⁹⁵ The bank argued that once it was proved that the section 129 (1) (a) notice was sent by registered mail to the correct branch of the post office, the credit provider may credibly aver receipt of the notice by the

⁹⁰ [2014] ZACC 1.

⁹¹ Ibid paras 3-5.

⁹² Ibid para 7.

⁹³ Ibid para 8.

⁹⁴ Ibid para 11.

⁹⁵ Ibid para 1.

consumer. The bank argued that the requirements of the Act were satisfied and that the burden of rebuttal then shifts to the consumer as to place additional requirements on the credit provider would impose 'too onerous' a burden.⁹⁶

5 2 Decision of the majority of the court

Mhlanthla AJ wrote the majority judgment on behalf of the Court. The court held that there was no general requirement that the notice be brought to the consumer's subjective attention or that personal service is required. The credit provider is expected to take steps to effect delivery of the notice which would bring it to the attention of a 'reasonable consumer'.⁹⁷ Once a notice has been dispatched by registered mail and the post office has delivered the notification to the consumer's designated address, valid delivery will not take place if the notice would not have come to the attention of a 'reasonable consumer'. However, if the credit provider complied with the requirements, it will be up to the consumer to show that the notice did not come to the attention of the consumer and the reasons why it did not.⁹⁸

The Court concluded :

'In sum, the Act does not require a credit provider to bring the contents of a Section 129 notice to the subjective attention of a consumer. Rather, delivery consists of taking certain steps, prescribed by the Act, to apprise a reasonable consumer of the notice. Thus, a credit provider's obligation may be able to make the Section 129 notice available to the consumer by having it delivered to a designated address. When the consumer has elected to receive notices by way of the postal service, the credit provider's obligation to deliver generally consists of despatching the notice by registered mail, ensuring that the notice reaches the correct branch of the Post Office for collection and ensuring that the Post Office notifies the consumer (at her designated address) that a registered item is awaiting collection. This is subject to the narrow qualification that, if these steps would not have drawn a reasonable

⁹⁶ Ibid para 12.

⁹⁷ Ibid para 97.

⁹⁸ Ibid para 98.

consumer's attention to the Section 129 notices, delivery will not have been effected. The ultimate question is whether delivery as envisaged in the Act has been effected. In each case, this must be determined by evidence'.⁹⁹

The court concluded that Mr Kubyana did not act as a 'reasonable consumer' in not collecting the Section 129 notice and accordingly dismissed the appeal.

5 3 Decision of Jafta J

Jafta J wrote a separate concurring judgment. He discussed the interpretation of section 129 (1) of the Act and further provided clarification on the judgment of the court in *Sebola*. The judge ruled that the meaning of the words 'delivered a notice to the consumer' is critical to the application of this section.

Jafta J further states that there is a presumption that, for example, if the credit provider chose to send the letter by ordinary post, proof of the letter reaching the consumer's address would ordinarily constitute delivery contemplated in the relevant section. However, if the consumer establishes that at the relevant time she was lying unconscious in hospital the credit provider would have failed to prove delivery. If the consumer is unable to provide a satisfactory explanation, the court will probably be satisfied that the notice reached the consumer.¹⁰⁰ As long as the credit provider is able to show on a balance of probabilities that the notice is likely to have reached the consumer, the court would be satisfied that the notice was delivered.¹⁰¹

Jafta J further interprets the *Sebola* judgment to mean that the section 129 notice must be taken to the consumer and must reach the consumer but that it need not necessarily be viewed by the consumer. The court expressly disagreed with the interpretation of *Sebola* as reflected in *Binneman*.¹⁰²

⁹⁹ Ibid para 39.

¹⁰⁰ Ibid paras 81-82.

¹⁰¹ Ibid para 83.

¹⁰² Ibid para 98.

5 4 Concluding remarks

Tsusi comments on the *Kubyana* judgment. He argues that the notice requirement is satisfied when the notice has been sent to the correct post office and thereafter it is up to the consumer to elect whether she collects the notice or not. He is of the view that Mr *Kubyana* relied on the wrong interpretation of the *Sebola* case, which was not concerned with a situation where a notice had been validly delivered but which had remained uncollected by the consumer. In *Sebola*, the notice was sent to the wrong post office.¹⁰³

In a 'Cliffe Dekker Hofmeyr' newsletter, the authors conclude that there is an onus on consumers to receive notices and not deliberately fail to collect them and rely on this failure to attempt to avoid legal action.¹⁰⁴

6 THE NATIONAL CREDIT AMENDMENT ACT¹⁰⁵

6 1 Introductory remarks

It was inevitable that the legislature provide clarity as regards section 129 (1) (a) following dissenting views of eminent jurists. The decisions of judges in the same division differed. Judges from different divisions gave conflicting judgments. The SCA judgment in *Rossouw* was overruled by the Constitutional Court in *Sebola*. *Sebola* itself was subject to differing interpretations in the Western Cape High Court and the Durban High Court. It became necessary for the Constitutional Court in *Kubyana* to revisit the issue and it is certain that the interpretation of *Kubyana* would have, itself, become fertile ground for further litigation. Even the Chief Justice differed with the majority of his Constitutional Court judges on the point.

¹⁰³ Tsusi 'The new approach of Section 129 of the National Credit Act' De Rebus June 2014 38-39.

¹⁰⁴ Cliffe Dekker Hofmeyr Publication 'Finance and Banking Alert' – dated 14th May 2014 5.

¹⁰⁵ Fn 28.

6 2 Background to the NCAA

On 23rd May 2013, the Minister of Trade and Industry, Dr Rob Davies, published the Draft National Credit Act Policy Review Framework for broader public comment. Whilst recording the positive contributions of the NCA, the policy document attempts to meet the challenges that have emerged since the passing of the NCA in 2005. The policy seeks to resolve 'legislative failures, including ambiguous drafting, incomplete provisions and unintended consequences relating to weak outcomes such as interpretation or implementation discrepancies'.¹⁰⁶

One of the major challenges that have emerged is that there are loopholes in the legislation that still allow for entities to avoid the provisions of the NCA. The NCAA's stated purpose is to close the *lacunae* in the NCA.¹⁰⁷ The policy document states clearly that effective consumer redress is the cornerstone of consumer protection legislation.¹⁰⁸

In his introductory address to Parliament on the National Credit Amendment Bill on 27th February 2014, Davies asserted that although the NCA achieved substantially its purposes, there was a need for certain amendments. He records, as a result of gaps in the implementation of debt counselling and debt review process, credit providers use parallel legal processes such as repossessions of homes in total disregard of the mechanisms in place to assist consumers to meet their obligations.¹⁰⁹

The Department of Trade and Industry (DTI) briefed the Select Committee on Trade and International Relations on the National Credit Amendment Bill, 2013 in Parliament. In the briefing the DTI stressed that although the NCA has been successful, there are areas of improvement that have been identified to make it more effective. The briefing highlighted the 'interpretation difficulties such as can be found in Section 129 regarding notifying the consumer of the default'.¹¹⁰

¹⁰⁶ National Credit Act Policy Review Framework (Fn 5) 9.

¹⁰⁷ Ibid 8.

¹⁰⁸ Ibid 33.

¹⁰⁹ Rob Davies – "Why the National Credit Amendment Bill?" – www.dti.co.za (accessed 23rd June 2014).

¹¹⁰ Presentation on the National Credit Amendment Bill by the Department of Trade and Industry – www.dti.co.za (accessed 23rd June 2014).

6 3 The amendment

Following the legislative process, the NCAA, was assented to by the President on the 19th May 2014. The amendment to section 129 reads:

- '(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 be 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 postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
 - (b) the signature or identifying mark of the recipient contemplated in subsection (5) (b).'

6 4 Concluding remarks

The legislature has seen fit to provide legislative guidance in the interpretation of section 129. The NCAA has not yet come into operation. I submit that its interpretation, in itself, will become a fertile ground for litigation, given the importance of the section 129 (1) (a) notice as well as the competing and substantial interests of the credit providers and consumers. A crucial question is whether the NCAA has met the objectives of the NCA and whether it has placed the interests of one stakeholder above the other. In order to answer this question, it is necessary to set out the objectives of the NCA, as enumerated, interpreted and discussed by our courts as well as by our academic writers and commentators.

7 EXCURSUS INTO THE PURPOSE OF CONSUMER LEGISLATION AND SECTION 129 (1) (a) OF THE NATIONAL CREDIT ACT

7.1 Legislation

It is clear from a perusal of section 3 of the NCA¹¹¹ that one of the stated objects and purposes of the Act is to 'protect consumers'. Section 3 (e) provides as follows:

- '(e) Addressing and correcting imbalances in negotiating power between consumers and credit providers by:
 - (i) Providing consumers with education about credit and consumers rights;
 - (ii) Providing consumers with adequate disclosure of standardised information in order to make informed choices ; and
 - (iii) Providing consumers with protection from deception, and unfair or fraudulent conduct by credit providers and credit bureaux.'

Section 3 of the Consumer Protection Act (CPA) sets out the purpose and policy of the Act. It is aimed at consumer protection.¹¹²

7.2 Purpose of the legislation as reflected in court decisions

Naidu AJ in *Prochaska* explained his views relating to the purpose of the Act. The Act has introduced 'innovative mechanisms and concepts directed more at the protection and in the interests of credit consumers than of credit providers'.¹¹³ The NCA represents a 'bold' and 'timely' effort to make a 'clean break' from the past.¹¹⁴ The SCA in *Rossouw* also accepts that the main object of the Act is to protect consumers. However, it holds that the interests of creditors must also be safe guarded and should not be overlooked.¹¹⁵ The

¹¹¹ (Fn 2).

¹¹² Van Eeden "Consumer Protection Law in South Africa" Lexis Nexis 2013 25.

¹¹³ *Prochaska* (Fn 29) para 21.

¹¹⁴ *Ibid* paras 15-16.

¹¹⁵ *Rossouw* (Fn 31) para 17.

SCA goes further by concluding that the fact that the section 129 notice need not actually come to the attention of the consumer does not defeat the purposes of the NCA.

The majority judgment in *Sebola* appreciated the force of the argument that the protection of consumer rights requires that primacy be given to section 129 (1). The court accepted the submissions of the *amicus curiae* that one of the statute's core innovations is that it is consumer friendly and promotes court avoidant procedures. The court accepted that access to debt counselling and extra-judicial resolution will undoubtedly have their most potent impact when the 'guillotine is about to fall'. And it is at this point, before the credit provider resorts to court process, that the legislation insists the consumer should have the benefit of a notice.¹¹⁶

Zondo AJ in a dissenting judgment in the *Sebola* matter with which Mogoeng CJ and Jaftha J concurred expresses the vital importance of the section 129 notice in that it makes the consumer aware that she is in default and of the credit provider's proposal that the credit agreement be referred to a debt counsellor and 'if there is a proposal that he refers the credit agreement, they can try to resolve it, debt restructuring can be resorted to, or the payments can be brought up-to-date'.¹¹⁷ Any interpretation of the NCA must promote the purposes of the NCA, and 'actual awareness promotes not only consumer protection but also the use of non-judicial mechanisms for resolving disputes which the NCA so clearly requires'.¹¹⁸ The minority judgment held therefore that the section 129 notice must come to the attention of the consumer to be effective. To support its findings, the minority judgment held that section 129 (1) (a) was enacted 'primarily, if not exclusively for the benefit and protection of the consumer'.¹¹⁹

Mhlantla AJ, writing for the majority in *Kubyana*, agrees that the NCA is directed at consumer protection. The court warns 'however, this should not be taken to mean that the Act is relentlessly one-sided and concerned with nothing more than devolving rights

¹¹⁶ *Sebola* (Fn 24) paras 45 – 49.

¹¹⁷ *Ibid* paras 60-61.

¹¹⁸ *Ibid* para 103.

¹¹⁹ *Ibid* para 107.

and benefits on consumers without any regard for interests of credit providers'.¹²⁰ Turning to section 129 the court held that the purpose of section 129 is to ensure that the attention of the consumer is sufficiently drawn to her default. It further empowers the consumer with knowledge of the variety of options she may follow. The court confirmed the aim of the provision is to facilitate the consensual resolution of credit disputes. Section 129 aims to establish a framework within which the parties to the credit agreement, in circumstances where the consumer has defaulted on her obligations, can come together and resolve their dispute without expensive, acrimonious and time-consuming recourse to the courts.¹²¹

Jaftha J, writing a separate concurring judgment wrote that the object of sections 129 and 130, 'is not to exempt consumers from their contractual obligations but to afford them the opportunity to renegotiate the terms of the credit agreement in relation to payment of the debt'.¹²²

Murphy J in *Dhlamini* commented that the purpose of section 129 (1) (a) read with section 3 (h), is to provide for a consistent and accessible system of consensual resolution of disputes and debt restructuring arising from credit agreements and that section 129 (1) (a) was deliberately designed to protect these aims. A non-rebuttable presumption of service or notice on mere dispatch of a notice in terms of section 129 would defeat these aims. To avoid unnecessary hardship and to comply with the objects of the NCA, the court concluded that section 129 (1) (a) required that a notice of any default by the consumer be brought to his or her actual attention, and that failure on the part of the credit provider to do so will bar the institution of legal proceedings, with the result that any action instituted before then will be premature.¹²³

¹²⁰ *Kubyana* (Fn 90) para 12.

¹²¹ *Ibid* para 20.

¹²² *Ibid* para 22.

¹²³ *Dhlamini* (Fn 34) paras 28-31.

7 3 Academic writers and commentators

Woker confirms that the CPA together with the NCA promote 'extensive consumer protection'. She argued that notwithstanding arguments that the legislation is unnecessary and will burden the South African economy further, this ignores the reality that consumers are vulnerable and that unfair practices are widespread.¹²⁴ Kelly-Louw agrees that the section 129 (1) (a) notice serves an important purpose. She states the main purpose of section 129 (1) (a) is to place a duty on the credit provider to inform the consumer of the possible assistance that there is at her disposal before legal action will be instituted. In other words, the notice allows the consumer the opportunity to decide whether she wishes to use the available alternative methods first to try to resolve the legal disputes without the credit provider's needing to resort to formal legal action. Section 129 (1), among other things, encourages consumers to approach debt counsellors as soon as possible to assist them to develop and agree on a plan to bring their arrear payments under their credit agreements up to date.¹²⁵ Van Heerden and Boraine agree with the views of Woker and Kelly-Louw. They confirm that the purpose of section 129 (1) (a) is that it presents a consumer with certain alternatives that he or she may consider prior to debt enforcement, in order to deal with the debt, alternatives which, if successful, might obviate the need for costly and often protracted litigation. It accordingly appears to be a compulsory procedure devised by the legislature in favour of the consumer obligating the credit provider to first propose certain alternatives by means of which the issue could possibly be resolved before turning to litigation. Where a section 129 (1) (a) notice is not delivered prior to the commencement of legal proceedings, the purpose of providing a means of avoiding litigation will be defeated.¹²⁶

Taylor encapsulates the views of academics relating to the NCA when he states:

'the Act focuses primarily on the consumer's rights and consumer protection, and providing assistance to the generally uninformed public. This was required as credit

¹²⁴ Woker (Fn 4) 230 – 231.

¹²⁵ Kelly-Louw (Fn 43) 579-583.

¹²⁶ Van Heerden and Boraine (Fn 40) para 3.8.

providers often included unreasonable provisions in the credit agreements. That had a detrimental effect on consumers. On the other hand the interests of the credit provider are also protected as the Act aims to provide effective enforcement of debt as well as effective access to redress. Effective redress would entail general contractual concepts such as restitution or specific performance, depending on the circumstances. The Act strives to redress the situation without unnecessary interference with the relationship between the credit provider and the consumer. However, a certain amount of interference is inevitable as the main purpose of the Act is to restore the balance between the parties' interests and the uneven bargaining position they find themselves in. The need for consumer protection is apparent as a result of the credit providers' exploitation of the consumers' lack of knowledge; however, the need to enable credit providers to enforce debt in a legal and acceptable manner is often understated'.¹²⁷

8 CRITICAL ANALYSIS OF THE DEVELOPMENT OF OUR LAW IN RELATION TO THE SECTION 129 (1) NOTICE

8 1 Introductory remarks

It is abundantly clear from an analysis of the authorities that the prevailing and overwhelming view is that the NCA is a consumer protection piece of legislation. It is readily conceded that the NCA seeks to balance the interests of the consumer with that of the credit provider. However, when a policy decision has to be made in circumstances where the interests of credit providers and consumers are substantially at odds and cannot be reconciled, in accordance with the main objective of the Act, it becomes imperative that the consumer protection objective of the legislation is afforded greater weight. Section 129 (1) (a) is an example of the need for a value judgment to be made. The *Sebola* judgment is a case in point. The majority, in attempting to balance the rights and interests of credit providers and consumers, arrived at a conclusion which was dissented to by Zondo AJ, Mogoeng CJ and Jafta J on the basis that the 'consumer protection' purpose of the legislation was not afforded sufficient emphasis.

¹²⁷ Taylor "Enforcement of debt in terms of the National Credit Act 34 of 2005 trial and celebration? A critical evaluation" 2009 *De Jure* 104.

Section 129 (1) (a) therefore must be interpreted in accordance with the overriding policy objective of the NCA, namely, that of consumer protection. It follows that section 129 fulfils a critical purpose in that it allows consumers and credit providers an opportunity to resolve disputes without having to resort to costly litigation.

The NCAA is a retrogressive step in consumer protection legislation and appears to have been a measure aimed at assisting the banks. In this regard, it is extremely unfortunate that the Draft National Credit Act Policy Framework proclaims: 'The NCA should preserve the policy of balancing of rights and should not prefer the rights of one stakeholder above the other. This is to ensure a sustainable consumer credit market'.¹²⁸ It is illogical to assume that it is always possible not to prefer the rights of one stakeholder above the other when the stakeholders have opposite and competing interests.

8 2 Court decisions criticizing large financial institutions

Murphy J in *Dhlamini* made an important observation, in most cases involving credit agreements a home or a motor vehicle is involved. The loss of either of these assets invariably will have a significant deleterious effect on the life of a consumer.¹²⁹ On the other hand the banks and other large credit providers have a major vested interest in the law relating to credit regulation given that consumer credit had ballooned to R1.39 trillion as at September 2012.

Whilst recognising that some consumers are 'serial defaulters' and utilize the provisions of the NCA merely to avoid payment of what is due to the credit providers the conduct of, especially, the banks have also come under scrutiny by the judiciary in some recent cases.

¹²⁸ Draft National Credit Act 2013 (Fn 5) para 2.1.4.9.

¹²⁹ *Dhlamini* (Fn 30) para 30.

Dhaya Pillay J In *Standard Bank of South Africa vs Dhlamini*¹³⁰ criticised the bank and found that the bank had acted unfairly in a number of respects towards the defendant. For example, she found that the bank's standard agreement was such a 'formidable' read, that to the defendant who could not read, write or understand English 'there might just as well have been no written agreement at all'.¹³¹

In this case the bank sought to hold Mr Dhlamini to a written agreement he had signed in respect of a motor vehicle. He had purchased the vehicle from a second hand motor vehicle dealer but the finance for the purchase had been provided by the bank. The dealer had facilitated the finance agreement. Mr Dhlamini returned the motor vehicle as a result of serious defects to the vehicle. The court declined to hold Mr Dhlamini bound to the agreement as, owing to the defendant's illiteracy¹³² and the failure of the bank to explain the contents of the agreement in circumstances under which there was duty on the bank to do so, there was 'no mutual consent'. Although this decision has been criticised as being criticised as being contrary to the principles of the law of contract, Louw regards it as an example of an emerging approach which emphasizes fairness and the pursuit of a contractual justice.¹³³ This view is echoed by Woker who says 'It does indicate that the judges are finally beginning to wake up to the realities of being an unsophisticated consumer in a very sophisticated economy'.¹³⁴

A summary judgment application served before the same judge in *Absa Bank Ltd, v Jennifer Ester Pillay and Another*.¹³⁵ The court found that the bank falsely notified the respondents that payments in respect of the credit agreement were in arrears. The bank sought foreclosure notwithstanding the mortgage bond was not in arrears purely on the basis that the first respondent's husband had passed away. The judge found this action constitutes: 'nothing short of bullying tactics by one of South Africa's largest financial institutions against

¹³⁰ 2013 (1) SA 219 KZD.

¹³¹ Ibid para 64.

¹³² Ibid.

¹³³ Louw "Yet another call for a greater role for good faith in the South African Law of Contract, can we banish the law of the jungle, while avoiding the elephant in the room" PER 2013 (16) 5 67-68.

¹³⁴ Woker Memorandum to Viren Singh.

¹³⁵ Unreported judgment delivered on 23rd October 2012, case nu. 4552/2012 (KZD).

a widow who is a historically disadvantaged person as defined in Section 2 (6) of the NCA .
The Applicants conduct is premature and predatory'.¹³⁶

In the *Papier* matter, Griesel J (in dealing with the issue of termination of a debt review in terms of 86 (10) of the NCA) noted evidence that some credit providers terminate the process in terms of Section 86 (10) as a matter of course as soon as the 60 business days have expired and that some credit providers even go so far as postponing the hearing in the Magistrate's Court and directly thereafter terminate the debt review in terms of Section 86 (10) , followed by a summons and an application of a summary judgment.¹³⁷

8 3 Views of Penzhorn AJ

Penzhorn AJ, sitting in the Durban High Court criticised financial institutions for 'unnecessarily selling people's homes from under them'.¹³⁸ The court queried several applications that came before him in which lenders were applying for default judgments against consumers, asking that the court declare their properties, usually primary residences, specifically executable.

'The court first queried one matter in which a bank wanted an order against the owner who owed R 14 000. 00 on a house he had owned for 11 years. Another matter of concern to the judge involved the property owned by a widow (83). 'She has been living here for 30 years and she has had the bond since 1994. Her husband has died and her son has indicated she is trying to sort out the situation and now Absa wants to sell the house from under her', the judge said. The report adds in another matter, where the money owing was under R 10 000. 00, he refused to grant judgment and ordered that the matter could not be re-enrolled until additional papers were drafted – confirming that the application had been served personally on the home owner, that the relief sought was fully explained to him or her, and that the opportunities given for the debt to become settled were detailed'.¹³⁹

¹³⁶ Ibid para 13.

¹³⁷ *Papier* (Fn 27) 395 et seq.

¹³⁸ Article published in the Natal Mercury, 24th June 2014, referring to case numbers 3549/14, 7247/13 and 2461/13 KZD hearing date – 23rd June 2014.

¹³⁹ Ibid.

In a follow-up interview with Penzhorn AJ, the judge explained that the court has a discretion in deciding whether to declare consumers' properties (which are their primary residences) executable. In exercising this discretion, he took into account that in the cases under discussion, the mortgage bond payments had a history of regular payment and that the amounts by which the mortgage bond was in arrears was not substantial. He referred to the 83 year old widow who was the respondent. Her bond payments only fell into default (after many years of regular payment) when her husband passed away. However, the executor of the husband's estate, (her son) was making attempts to resolve the situation. The judge commented that the banks are in possession of most of the consumers' contact information and that there should be an honest attempt to resolve these issues prior to resorting to heavy handed tactics. He deplored the conduct of Absa in this matter and questioned whether Absa's head office in Johannesburg was even aware of these sorts of applications to sell off peoples' homes. He referred to a matter which had served before him during a previous stint as acting judge regarding a consumer from Harding who had regularly made payment for more than ten years, and for some unknown reason (it was an application for default judgment so the consumer was not present in court) had recently fallen into arrears. He adjourned the matter for two weeks and ordered that the bank's attorney make contact with the consumer. On the return date the matter had been resolved. He said that although the banks are, in law, entitled to declare a consumer's property executable in the event of default, every possible step to avoid such a path should be followed. It is for this reason he ordered that an affidavit be filed detailing the steps the bank had taken to bring to the consumers' attention the default and to explore other methods of resolving the dispute.¹⁴⁰

In a separate interview with an attorney of over 30 years' experience, Mr A. Haripersad, who was present in Court on the 23rd June 2014 when Penzhorn AJ made the orders, commented that counsel for the bank had argued that the refusal to grant orders declaring properties executable would affect the economy. Penzhorn AJ responded that it would

¹⁴⁰ Interview with Penzhorn AJ of 30th July 2014.

affect the economy if peoples' homes were sold when trifling amounts were owed to the banks.¹⁴¹

Minister of Trade and Industry, Dr Rob Davies, in arguing for the need for the National Credit Amendment Act said that 'credit providers' are using 'legal proceedings such as repossessions of homes in total disregard of the mechanisms in place to assist consumers to meet their obligations'.¹⁴² Although Minister Davies has alluded to laudable objectives (of the NCAA) it appears that intensive lobbying by the banks have diluted these objectives.

8 4 Critique of the NCAA

In the credit industry we have two key role players whose interests are contradictory and irreconcilable. It therefore becomes impossible not to, in specific circumstances, make a policy decision in favour of one or the other key role player. In order to do that, the primary purpose of the NCA must be given effect to. It has been accepted by the judiciary and academic writers and jurists in general that the primary purpose of the NCA is consumer protection. The provisions relating to 'reckless lending' and 'over-indebtedness', for example, clearly establish this fact.

It is against this backdrop that one needs to assess the NCAA. The main criticisms levelled at the NCAA are that, firstly, on a literal interpretation of the amendment to section 129, a consumer may be in a worse position than she was prior to the amendment and, secondly, the amendment does not further the basic purposes of the NCA and in fact runs counter to it. It will be argued that the drafters of the amendment chose to emphasise the interests of the banks over that of consumers. The chairperson of the Portfolio Committee on Trade and Industry made the point that the amendments appear to have been made 'in a determined attempt to listen to the banking industry'.¹⁴³

¹⁴¹ Interview with Mr A Haripersad of 2nd July 2014.

¹⁴² Rob Davies (Fn 109.)

¹⁴³ Patrick Mclaughlin, "National Credit Amendment Bill Changes" – www.dti.gov.za (accessed on 25th June 2014).

In a report on the public hearings in Parliament, the following is stated: 'BASA then took their place in the front row of seats. The row quickly filled up with multiple representatives from all the major banks. Cas Coovadia led the banks charge'. Inter alia, he said regarding section 86, BASA (Banking Association of South Africa) still want to exclude section 129 notices from its ambit. BASA also want to be able to continue to terminate their participation in a debt review process as set out in the NCA as it is at present. They do not want to have to resolve matters at court. FNB (First National Bank) added that they were also not in favour of the proposed changes to section 86 (10), as the proposed amendment could be abused by 'non-paying consumers putting the matter into court and then not paying'. Debt counsellors hit back that the banks abused section 86 (10) so much in the past that they now have no credibility in making demands regarding this section.¹⁴⁴

8 5 Interpretation of amendment

It is clear that in terms of section 2 (1) of the NCA, a purposive interpretation must be followed in interpreting the amendment. This is confirmed in the *Sebola* judgment.¹⁴⁵ Accordingly, the proper approach would be that followed by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs*:¹⁴⁶

'The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in *Thoroughbred Breeders Association v Price Waterhouse*,¹⁴⁷ the SCA has reminded us that the days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning'.¹⁴⁸

On a literal, conservative interpretation the plain ordinary grammatical meaning of the words contained in the subsection must be given effect to. Once the court is satisfied that

¹⁴⁴ National Debt Mediation Association, Quarterly Newsletter, May 2014 www.dti.co.za (accessed 25th June 2014).

¹⁴⁵ *Sebola* (Fn 24) paras 45-49.

¹⁴⁶ 2004 (4) SA 490 (CC).

¹⁴⁷ 2001 (4) SA 551 (SCA).

¹⁴⁸ *Bato Star Fishing* (Fn 146) 490.

the notice has been sent to the correct post office, the requirement of the section 129 (1) (a) notice would have been satisfied. There is no room in these circumstances for the consumer to satisfy the court that in fact she did not receive the notice even if she was a 'reasonable consumer'.¹⁴⁹

The absence, for example, of the words '*prima facie* proof' in the subsection under discussion supports such an interpretation. On this interpretation, notwithstanding non receipt of the notice it is not open to the consumer to rely on the fact that she did not receive the notice (even if she had been in hospital in a coma at the time the notice was delivered to the correct post office). For example, Section 212 of the Criminal Procedure Act¹⁵⁰ provides that certain documents may be handed into court, as '*prima facie* proof' of the contents of such documents. The addition of the words '*prima facie* proof' will then clearly allow an accused person an opportunity to dispute that the documents sought to be handed in constitute conclusive proof of its contents.

Alternatively, the legislature uses the phrase unless the 'contrary is shown', or 'unless there is an indication to the contrary' or unless 'the contrary is proved'. This rebuttable presumption is contained in, for example, the now repealed Abuse of Dependence Producing Substances and Rehabilitation Centres Act.¹⁵¹ The purpose of these provisions was and is to allow a party to the litigation to rebut the presumption that she is, for example, in possession of drugs or that she was dealing in drugs. Section 73 and 74 of the Road Traffic Act provide further examples.¹⁵²

If, indeed, this is the interpretation placed by our courts on the subsection, this would have adverse effect on the consumer and place her in a worse position than she was prior to the amendment. In regard to delivery by registered post, even in the *Munien*¹⁵³ matter, Wallis J concluded that although the risk of non- receipt would lie with the consumer as the consumer would have chosen the method of delivery, he accepted , that

¹⁴⁹ *Kubyana* (Fn 90) para 37.

¹⁵⁰ Act 51 of 1977.

¹⁵¹ Act 41 of 1971.

¹⁵² Act 93 of 1996.

¹⁵³ *Munien* (Fn 38) para 31.

the onus of proving delivery of the section 129 (1) (a) notice rested on the credit provider. The court held that the fact that the legislature granted the consumer a right to choose the manner of delivery inexorably pointed to an intention to place the risk of non-receipt on the consumer's shoulders and the actual receipt of the section 129 (1) notice is the consumer's responsibility.

The *Sebola* judgment expressly gives the consumer the opportunity to prove that she did not receive the notice. The court says: 'Where the credit provider posts the notice, proof of registered dispatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of a contrary indication constitute proof of delivery. If in contested proceedings the consumer avers that the notice did not reach him or her, the Court must establish the truth of the claim'.¹⁵⁴

The *Binneman* judgment criticised the phrase 'in the absence of a contrary indication'. The court in *Kubyana* clarified the phrase as follows.

'A contrary indication would be a factor showing that, in the circumstances and despite the credit provider's efforts, the notification did not reach the consumer's designated address. The second inference is based on the assumption that a consumer acting reasonably would, having received the notification from the Post Office to retrieve an item, proceed to collect the notice. In these circumstances, a contrary indication would be a factor showing that the consumer acted reasonably in failing to collect or attend to the notice, despite the delivery of the notification of her address'.¹⁵⁵

It is earnestly hoped that the courts, in interpreting the subsection do not come to the conclusion that it precludes the consumer from establishing that, in fact, through no fault of her own, she did not receive the section 129 (1) (a) notice. A logical and sensible argument can be made out, on a purposive interpretation, that the legislature could not have intended such a result as it would lead to an absurdity (in that the crucial purpose

¹⁵⁴ *Sebola* (Fn 24) para 87.

¹⁵⁵ *Kubyana* (Fn 90) para 52.

of section 129 with then be nullified). A further indication that on a purposive interpretation, the above absurdity would not result are the provisions of section 130 (3), which provide that a court may only determine a matter if it is satisfied that the provisions of section 129 have been complied with. It is arguable that a court will only be satisfied that the provisions of section 129 have been complied with if the probabilities favour the conclusion that the notice was, in fact, brought to the attention of the consumer.

In the event that our courts interpret the provision contrary to the interests of the consumer it is theoretically possible that a consumer will challenge the constitutionality of the subsection, possibly on the basis that the subsection contravenes section 10 of the Constitution, 1996, in that it has the effect of infringing the dignity of the consumer as it violates the consumer's socio-economic rights. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*.¹⁵⁶ Makgoro J commented (*albeit obiter*) that the Constitutional Court in *Government of the Republic of South Africa and others v Grootboom and Others*¹⁵⁷ made it clear that any claim based on socio-economic rights must necessarily engage the right to dignity.... 'Each time an applicant approaches the Courts claiming that his or her socio-economic rights have been infringed the right to dignity is invariably implicated'.¹⁵⁸

It is unlikely, however, that a constitutional challenge would succeed. The counter argument is that the Act balances the rights of the credit providers and consumers and that in accordance with this policy the subsection was passed. The subsection cannot be said to be contrary to the principle of legality or in any way irrational or even overbroad. Even if the consumer proves that his right to dignity has been impaired, the limitation clause obtained in section 36 of the Constitution, 1996 would probably avail the credit providers.

¹⁵⁶ 2003 (10) BCLR 1149 (CC).

¹⁵⁷ 2001 (1) SA 46 (CC).

¹⁵⁸ *Ibid* para 21.

8 6 The amendment does not accord with the purposes of the NCA

The debate in the High Court, Supreme Court of Appeal and the Constitutional Court revolve around the manner in which the section 129 (1) (a) notice must be brought to the attention of the consumer. The courts differed on whether the risk of non-receipt of the section 129 (1) (a) notice rested with the consumer or credit provider. Each court sought to justify its decision by adopting a particular interpretation. In order to assess which interpretation ought to have been adopted, which in turn would have informed the amendment of the NCA, it is necessary to examine the reasons provided for adopting the interpretation the court did in fact adopt.

Wallis J in the *Munien* case provided the following reasons for adopting the approach that he did. He said that in previous consumer legislation such as the section 12 (b) of the Old Hire Purchase Act¹⁵⁹ the default notice need not have been served on the consumer. He reasoned further that if the legislature had intended that the notice must come to the actual attention of the consumer, it would have said so in plain language. He further stated that although he considered the purposes of the NCA, they should not alter the plain meaning of the wording in the definition of 'delivered' as contained in regulation 1 of the regulations to the Act.

Zondo AJ in the *Sebola* dissenting judgment deals with the argument relating to other legislative enactments and the impact they have on the interpretation of the NCA. At common law, Zondo AJ argues that notice of termination of a contract is required to reach the mind of the other party. He reasons that it would be contrary to logic and common sense that the NCA, which is consumer protection legislation, would seek to give less rights to a party to a contract than would the common law.

In regard to the interpretation of similar statutes, Zondo AJ disagreed with the view of Wallis J that, for example, Section 12 (b) of the Hire Purchase Act did not require that the notice come to the actual attention of the consumer. Zondo J referred to both the Hire

¹⁵⁹ Act 36 of 1942.

Purchase Act as well as section 13 (1) of the Sale of Land in Instalments Act.¹⁶⁰ Zondo AJ also relied on *Maharaj v Tongaat Development Corporation (Pty) Ltd*¹⁶¹ in reaching a different conclusion to that reached by Wallis J. Moreover, as pointed out by Van Heerden and Boraine, the NCA is a much more comprehensive piece of legislation than the repealed Credit Agreements Act.¹⁶² Woker also agrees that the CPA and the NCA provide comprehensive and extensive protection.¹⁶³ It was precisely because the Credit Agreements Act was defective in many respects that the NCA was enacted. The Constitutional Court in *Sebola* agreed that the NCA constitutes a decisive break from the past.¹⁶⁴ Finally the contents of section 13 of the Credit Agreements Act differ substantially from the contents of section 129 (1) (a) and 130 (1) (a) of the NCA.

Wallis J further argued the legislature would have made it clear in the event that it required the notice to come to the actual attention of the consumer. With respect, this is a marginal argument, as the legislature did not make it clear one way or another. Moreover, the lack of clarity in the draftmanship of the Act has been commented upon by numerous jurists, including the Constitutional Court. For example, in *Starita*, the court pointed out that the Act was badly drafted.¹⁶⁵ Cameron J in the *Sebola* judgment says 'The lack of clarity in the drafting of the Act has justly been bemoaned'.¹⁶⁶ The court in *Nedbank Ltd and Others v National Credit Regulator and Another*¹⁶⁷ said 'there were numerous drafting errors, untidy expressions and inconsistencies make interpreting the Act a particularly trying exercise'.

In regard to Wallis J's reliance on regulation 1 of the regulations to the NCA, Gautschi AJ, in *Starita*, disagrees with his interpretation even though the court in *Starita* also concluded that actual receipt of the notice was not required. Gautschi AJ held that a clear answer to the 'interpretation question' was to be found in sections 65 and 168 of the Act and that

¹⁶⁰ Act 72 of 1971.

¹⁶¹ 1976 (4) SA 994 (A).

¹⁶² Van Heerden and Boraine (Fn 46).

¹⁶³ Woker (Fn 4) 217.

¹⁶⁴ *Sebola* (Fn 24) para 39.

¹⁶⁵ *Starita* (Fn 38) para 18.9.

¹⁶⁶ *Sebola* (Fn 24) para 66.

¹⁶⁷ 2011 (3) SA 581 SCA.

regulation 1 of the regulations to the Act could not be used to interpret the Act.¹⁶⁸ In this argument, Gautschi AJ is supported by Kelly-Louw.¹⁶⁹ The '*Sebola*' judgment expressly disavows the reasoning of Wallis J on this point.¹⁷⁰

One of the themes that permeate the arguments of the banks is that to require proof that the notice actually came to the attention of the consumer would be to place too onerous an obligation on the banks. Olsen AJ noted evidence of the large number of section 129 letters which were returned unclaimed. ABSA Bank kept records for the period January to May 2012 in respect of the whole of South Africa. Between 66.3 percent and 70 percent of all letters were returned 'unclaimed'.¹⁷¹

Based on this evidence, it is apparent that the sending of a registered letter amounts to an untenable legal fiction that the notice did in fact come to the attention of the consumer, as is required in terms of the NCA. When one considers this argument (that it would be too onerous a duty on the banks to expect more) against the critical importance of the Section 129 notice, the banks argument pales into insignificance. As Zondo AJ points out:

'In South Africa the majority, if not all, of the people who are subject to this poor postal service are black and poor. They form part of the group that the NCA seeks to protect and benefit under Sections 129 (1) (a) and 130. In my view, as far as possible, an interpretation that will prejudice so large a section of the people that the NCA seeks to protect should be avoided. In the construction of Sections 129 (1) (a) and 130 (1) (a), it is possible to avoid such an interpretation'.¹⁷²

These passages surely illustrate that sending a notice by registered post does not necessarily mean that such notice will come to the attention of the consumer and if the notice does not come to the attention of the consumer, then the overriding purpose of section 129 is defeated.

¹⁶⁸ *Starita* (Fn 32) 443.

¹⁶⁹ Kelly-Louw (Fn 43) 585.

¹⁷⁰ *Sebola* (Fn 24) para 61.

¹⁷¹ *Mkhize* (Fn 80) para 20-21.

¹⁷² *Sebola* (Fn 24) para 161.

Penzhorn AJ in his interview referred to the 'ostrich' or 'head in the sand' approach.¹⁷³ Essentially this means that consumers would attempt to evade the reality of the default by hiding or running away from their repayment obligations, by burying their 'heads in the sand'. The Constitutional Court also recognises that it is only when the guillotine is about to fall that people will be forced to take action.¹⁷⁴ This reinforces the view that sending a registered letter to a post office closest to the address chosen by the consumer in the credit agreement will not be effective in bringing the default to her attention.

It follows that the reasoning in the *Munien* case which laid the foundation for the interpretation that the notice does not have to come to the actual attention of the consumer is fallacious. Notwithstanding this fallacious reasoning, however, the NCAA has given effect to it. The Constitutional court in *Sebola* made it clear that ordinarily (in default judgment applications) the fact that a registered letter was sent to the correct post office would be sufficient '*prima facie*' proof (in the absence of any denial of receipt by the consumer) that the notice was received by the consumer). In an opposed trial the issue of the receipt of the notice would be fully ventilated and the court would make a finding. It is submitted that the onus would be on the credit provider as plaintiff to prove this fact, although the consumer may be saddled with an 'evidential burden'.

I am in respectful agreement with the view of Zondo AJ, Mogoeng CJ and Jafta J when they hold:

'in my view of section 129 (1) (a) , which entails that the credit provider must make the consumer aware of the default and of the proposal contemplated in Section 129 (1) (a), accords with the language of the provision, is fair, gives effect to the purpose of Section 129 (1) (a) and gives appropriate weight to the legislature's intention to make cancellation and judicial enforcement of credit agreement measures of last resort that must be resorted to when the dispute resolution

¹⁷³ Fn 135.

¹⁷⁴ *Sebola* (Fn 24) para 59.

mechanisms prescribed by the NCA have been exhausted and the consumer has been afforded an opportunity to avoid such steps'.¹⁷⁵

An argument raised by the banks and accepted by Wallis J and even the SCA in *Rossouw* is that it would be virtually impossible for credit providers to prove that the notice has actually come to the attention of the consumer. If, for example, the consumer, having received the notice and refuses to read the notice she can then be taken to have waived her rights in relation to the notice. In all other instances, however, it would be possible to prove to the court on a balance of probabilities that the notice came to the actual attention of the consumer. If a registered letter is sent, the recipient is required to produce a copy of her identity document and to acknowledge receipt of the registered letter in writing. That would ordinarily constitute sufficient proof.

In the event, however, that the letter is returned 'unclaimed' by the postal service, then other reasonable steps would have to be taken. Olsen AJ recommended that the notice also be sent by ordinary post.¹⁷⁶ There has also been a suggestion that an employee from the bank visit the consumer and either depose to an affidavit or get the consumer to acknowledge receipt of the notice in writing.¹⁷⁷ However, given the conduct of some of the agents of the bank when such agents seek to get consumers to sign 'voluntary surrenders' and the tactics they use (anecdotal horror stories abound), it would be preferable, in my view, for the notice to be served by the sheriff as is the case with summons.

The argument raised by the banks is that this would produce an onerous burden on the sheriffs who would be unable to meet the demand given the large number of notices sent out. A further argument raised is that this would escalate costs which would eventually be to the detriment of the consumer. Dealing with this latter argument first, in an urban non-urgent service, the sheriff's fee (in Durban) is rarely more than R250 to R300. Given the importance of the notice, that it is the last step prior to the institution of legal proceedings, this cost either to the consumer or to the bank is not overly burdensome. In order to sign a

¹⁷⁵ *Sebola* (Fn 24) para 176.

¹⁷⁶ *Mkhize* (Fn 80) paras 66-76.

¹⁷⁷ *Ibid* para 77.

standard term credit agreement relating to, for example, a motor vehicle the ‘administration’ or ‘initiation’ fee relating to this is in excess of R500.¹⁷⁸ An administration fee of not less than R50 is charged on every payment made even though the systems are highly computerised.¹⁷⁹ Moreover, this process of engaging the consumers should be seen by the banks as a means to prevent the escalation of costs, as it is possible that the matter may be resolved without litigation. In regard to the issue of the lack of capacity of the sheriffs, surely it should not lie in the mouths of the banks to raise this point but rather from the sheriffs themselves. It is extremely unlikely that the sheriffs would object as they would stand to benefit from this additional service. In the event of a recalcitrant consumer a further argument raised by the banks is they would evade service of the section 129 (1) (a) notice. In such event, the rules relating to substituted service (as provided for in the Uniform Rules of Court), or approaching a court for directions as to an acceptable mode of service of the section 129 (1) (a) notice would remedy this problem.

In the event that this view is regarded as unreasonable and unworkable, then, it is submitted that, at the minimum, in the case of credit agreements relating to immovable property, the section 129 (1) (a) notice should be served personally on the consumer as it may impact on his right to housing. Indeed, when a consumer’s primary residence is at stake, a section 129 (1) (a) notice should be notifying the debtor that, should action be instituted and judgment obtained against her, execution against her residence will ordinarily follow and usually lead to her eviction therefrom.¹⁸⁰ Whilst making this judicial injunction, in the same breath, courts are expected to uphold the legal fiction contained in the NCAA knowing very well that the notice has, in fact, not come to the attention of the consumer. ‘Poverty come and see it lives in the shanty. Come look and see poverty it smells, it can be touched’ are powerful words written by Mongane Wally Serote in ‘Freedom Lament and Song’.¹⁸¹ Section 26 of the Constitution is our response to the blight of poverty. It is a most basic right and encompasses the right to dignity.

¹⁷⁸ *Mercedes Benz Financial Services v Power Ahead CC* – unreported case number 12444/11 (KZD).

¹⁷⁹ *Ibid.*

¹⁸⁰ *FirstRand Bank Ltd v Folscher* 2011 (4) SA 314 (GNP).

¹⁸¹ Cheadle et al ‘*South African Constitutional Law*’, The Bill of Rights Issue 1 21-1.

Makgoro J in *Jaftha v Schoeman and Others and Van Rooyen v Stoltz and Others*¹⁸² quotes with approval the immortal words of Mahomed J writing with reference to the death penalty.

‘All Constitutions seek to articulate, with differing degrees of intensity and detail the shared aspirations of a nation; the values which bind it’s people , and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to exercised; the national ethos which defines and regulates that exercise ; and moral and ethical direction which that nation has identified for its future. In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different; it retains from the past only what is defensible and represents a decisive break form and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive , and a vigorous identification of and commitment to a democratic , universalistic , caring and aspirationally egalitarian ethos articulated in the Constitution . The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic’.¹⁸³

Mokgoro J goes on to extol the importance of having one’s own home. ‘Relative to homelessness , to have a home one calls one’s own, even under the most basic circumstances , can be a most empowering and dignifying human experience’.¹⁸⁴

Section 4 (2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act¹⁸⁵ (PIE) provides that ‘at least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction’.

¹⁸² 2005 1 BCLR 78 (CC) – (hereafter ‘Jaftha’).

¹⁸³ *S v Makwanyane* 1996 1 388 CC.

¹⁸⁴ *Jaftha* (Fn 182) para 39.

¹⁸⁵ Act 19 of 1998 – (hereafter ‘PIE’).

The courts have consistently interpreted the section to mean that even prior to serving the section 4 (2) notice on the illegal occupier, the consent of the court must first be obtained. It is a notice sanctioned by the court that is served on the illegal occupier. Section 4 (4) of the Act further prescribes that the court must be satisfied with service and must consider the rights of the unlawful occupier to receive adequate notice and to defend the case. This subsection has resulted in an almost immutable rule that there must be personal service on the illegal occupier. The rationale for the rule is that it enhances the right contained in section 26 of the Constitution, 1996.¹⁸⁶

Olsen AJ points out, when a court has to consider a PIE application and it comes to the attention of the court that the section 129 (1) notice did not come actually to the attention of the consumer, the court may take that fact into account in the exercise of the court's discretion in deciding whether or not to grant the eviction application.¹⁸⁷ I am not certain that the courts would in fact adopt such an approach as section 4 (8) of PIE states as follows: 'If the court is satisfied that all requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must be grant an order for the eviction of the unlawful occupier....'

Be that as it may, the gateway provision that opens the path to the eventual eviction (if the option of debt counselling is not followed) is section 129 of the NCA. The purpose of the NCA is pursued through the 'consensual resolution of disputes arising from credit agreements'. A section 129 (1) notice plays an essential role in achieving this purpose by requiring a credit provider to draw a defaulting consumer's attention to the fact that he may pursue the assistance of a 'debt counsellor, alternative dispute resolution agent, consumer court or ombud' with the objective of reaching an agreement with the credit provider.¹⁸⁸

¹⁸⁶ For example, see *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and 3 Others* 2008 (5) BCLR 475 (CC).

¹⁸⁷ *Mkhize* (Fn 80) para.

¹⁸⁸ Fuchs 'The impact of the National Credit Act 34 of 2005 on the enforcement of a mortgage bond: *Sebola v Standard Bank of South Africa* 2012 5 SA 142 CC' *PER* 2013 (16) 3 377.

Relying on an acceleration clause in a standard term contract formulated by the banks, even if the arrears is for a trifling amount, default judgment will be sought and most probably granted . A standard prayer in a summons issued by the bank is to ‘declare the immovable property specifically executable’. Once this has been done the consumer is in illegal occupation of the property and accordingly there would be no defence to the application for the consumer’s eviction. (As an aside, although section 4 (2) provides for notice to be served on the municipality, the Ethekewini municipality simply ignores this notice and the organ of state’s constitutional responsibility in this regard is generally ignored). At best, the court, in the exercise of its discretion, may delay he eviction process to afford the consumer an opportunity to obtain alternative housing.

The impact of section 129 (1) (a) on the consumer’s right to housing is real. Kelly-Louw agrees with the court in *FirstRand Bank Ltd v Maleke and Three Similar Cases*¹⁸⁹ that the section 129 (1) (a) notice itself (not only the summons), if applicable, should also inform the consumer of her right of access to adequate housing set out in section 26 of the Constitution and contain an explicit warning to the consumer that she may end up losing her home by way of an execution sale if the credit provider is successful with his legal action.¹⁹⁰

I regret to conclude that the banks are riding roughshod over consumer rights in regard to section 129 (1) (a). The reason for this is obvious. In the event that the consumer does go to an alternative dispute resolution agent or to a debt counsellor, a process will be embarked upon which may delay payment in terms of the credit agreement to the bank. It may even have an effect of the bank having to renegotiate the terms of the agreement which may result in financial loss.

As early as 2008, Kelly-Louw said the following:

‘There is a huge potential demand for debt-counselling assistance and it is estimated that 300 000 South African consumers find themselves in an extreme over-indebted

¹⁸⁹ 2010 (1) SA 143 (GSJ).

¹⁹⁰ Kelly-Louw (Fn 43) 200.

position, while a further million or more are potentially debt-stressed. It would thus appear that debt counselling has a very important role to play. In the FinMark Trust research report referred to above, researchers correctly observed that debt counsellors would provide important social support, but preventing over indebtedness is equally as important as solving the problem after the fact'.¹⁹¹

Kelly-Louw's forecast has been proved correct. The debt review process has attracted some 363 000 individuals who have applied for debt counselling by the end of June 2012 and some R 8.5 billion has been distributed to credit providers through the process.¹⁹²

8 7 Conclusion

As can be seen from this dissertation, this conundrum cannot easily be resolved. Otto concludes:

'to find a solution to the problem highlighted in this note is not easy . The cases discussed illustrate this. The judges held different views bases on their individual interpretations of words and expressions in the NCA and on the purposes of the Act. Consumer credit legislation is an emotive issue. There are different interests at stake, and it is not difficult for judges and the public at large (which includes consumers and credit providers alike) to hold different views. It is possible for men of good faith to differ substantially'.¹⁹³

Sebola has come and gone. *Kubyana* has come and gone, The NCAA is a *fait accompli* even though the implementation date has not been fixed. The only two remaining questions are: firstly how these provisions are to be interpreted by our courts and secondly how are the purposes of the NCA best achieved given the current objective conditions.

¹⁹¹ Ibid 225.

¹⁹² Draft National Credit Act Policy Review Framework (Fn 5) para 1.9.4.

¹⁹³ Otto 'Notice in terms of the National Credit Act: Wholesale national confusion' 2001 *Merc LJ* 605.

Wallis J accepted that the onus of proving that the section 129 (1) (a) notice was in fact given rested on the credit provider. It was only the risk of non-receipt that was on the consumer. It is earnestly hoped that our courts would still allow a defence that the notice did not actually come to the attention of the consumer through no fault of her own. The concept of a 'reasonable consumer', in the light of the prevailing conditions is our best option. This dissertation does not seek to protect serial defaulters or consumers who actively evade receipt of notices and legal documents. It is aimed at those consumers who genuinely have not received section 129 notices through no fault of their own. Perhaps protection should be extended to these consumers who have not notified the banks of the change of the domicilium address but such change of address is known to the banks through their own investigations or when the 'new address' is easily obtainable (perhaps via telephonic contact). This is in line with the evidence led by Absa Bank before Olsen AJ wherein the bank averred that prior to instituting legal proceedings, attempts are made to contact the consumers. Surely during these telephonic contacts, any change of address details could be obtained.¹⁹⁴ At the very least, it should not be countenanced that, even though the credit provider is aware that the 'domicilium citandi et executandi' address is not the address at which the consumer resides, service at that address should be regarded as sufficient compliance, even though the consumer (who may not fully understand the importance of choosing or changing his service address) did not in terms of the conditions contained in the credit agreement advise the credit provider of the change of address.

I am of the view, however, that the only resolution to this conundrum is the education of consumers. Section 3 (1) (e) of the CPA provides that one of the purposes of the Act is to improve consumers awareness and information and encourage responsible and informed consumer choice and behaviour. Section 3 (2) of the CPA provides that the Commission (the National Consumer Commission) shall take reasonable measures to promote the Act and advance the interest of consumers and conduct research and

¹⁹⁴ *Mkhize* (Fn 80).

propose policy. In terms of section 96 of the CPA, the Commission is responsible to increase knowledge and to develop and implement education and information measures in the community.

Section 3 (e) provides one of the purposes of the NCA as:

'addressing and correcting imbalances in negotiating power between consumers and credit providers by

- (i) Providing consumers with the education about credit and consumer rights;
- (ii) Providing consumers with adequate disclosure of standardised information in order to make informed choices ; ...'

The CPA as well as the NCA have generated awareness and interest in consumer protection legislation. The internet has facilitated access to information. Academics and journalists have also contributed to the growth of the consumer movement. The consumer movement must be strengthened. The National Credit Regulator (NCR) has already assisted the consumer by seeking various declaratory orders from the courts and by spreading the message of consumer rights. A strong powerful consumer movement will balance the immense power wielded by the banks. Given the NCA in relation to section 129, consumers will have to look after themselves. Consumers need to be made aware that if they are in trouble with making their credit payments timeously, they need to take urgent action and not to adopt the 'head in the sand' approach.

Subsection 129 (5) (b) provides that the section 129 (1) (a) notice must be delivered to 'an adult person at the location designated. Subsection 129 (7) (b) is satisfied by the signature or identifying mark of the recipient. Subsection 6 gives the consumer the choice between registered mail and service on an adult person at the location designated by the consumer. It is crucial, I submit, in order that the section 129 (1) (a) notice meets its laudatory objectives, for consumers to be encouraged (even by means of media advertising) to choose subsection 5 (b) of the NCA. Regrettably, I suggest that credit

providers will encourage consumers to choose the “registered letter” route. Further, in line with our law of contract, consumers should be required to sign at the appropriate paragraph of the credit agreement confirming that this choice has been explained to them. Perhaps this clause should be in “bold print” to alert a consumer to this choice. In this event, even if a consumer moves from his chosen address, depending on the court’s interpretation, credit providers may have to make further attempts to locate the consumer in order to serve the section 129 (1) (a) notice.

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