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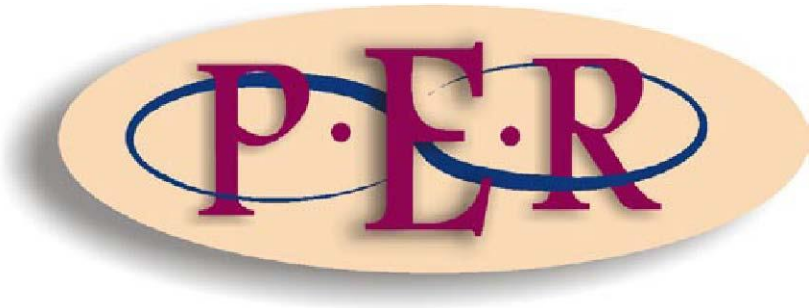

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THE IMPACT OF THE *NATIONAL CREDIT ACT* 34 OF 2005 ON THE ENFORCEMENT OF A MORTGAGE BOND: *SEBOLA V STANDARD BANK OF SOUTH AFRICA LTD* 2012 5 SA 142 (CC)

MM Fuchs*

1 Introduction

When a mortgagor is in default and the mortgagee wants to enforce the debt, the *National Credit Act* 34 of 2005[1] may apply. If the mortgagor (who is a protected consumer in terms of the NCA) is in default, the mortgagee must deliver a section 129(1) notice to the consumer thereby drawing the default to the attention of the consumer.[2]

Sections 129(1) and 130(1) of the NCA are of cardinal importance and provide for the procedures that should be followed by a credit provider before debt enforcement can take place. They provide as follows:

> Section 129 Required procedures before debt enforcement
> (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* (*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*) (ii) meeting any further requirements set out in section 130. [My emphasis]
>
> Section 130 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 and has been in default under that credit agreement for at least 20

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1 The *National Credit Act* 34 of 2005 (hereafter referred to as the NCA).

2 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [45]; Otto and Otto *National Credit Act Explained* (2013) 111; Van Heerden and Coetzee 2012 *Litnet (Akademies) Regte*.

> business days and - (*a*)at least 10 business days have elapsed since the *credit provider delivered a notice to the consumer* as contemplated in section 86 (9), or section 129 (1), as the case may be; (*b*) in the case of a notice contemplated in section 129 (1), the consumer has- (i) not responded to that notice; or (ii) responded to the notice by rejecting the credit provider's proposals; and (*c*) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127. [My emphasis]

In the recent Constitutional Court judgment of *Sebola v Standard Bank of South Africa Ltd*[3] it was held that before instituting action against a defaulting consumer, a credit provider must provide proof to a court that a section 129(1) notice of default (i) has been despatched to the consumer's registered address and (ii) that the notice reached the appropriate post office for delivery to the consumer, thereby coming to the attention of the consumer.[4] In practice the credit provider must obtain a post-despatch "track and trace" print-out from the website of the South African Post Office.[5]

The *Sebola* judgment overturned an earlier interpretation of the section 129(1) notice in *Rossouw v Firstrand Bank Ltd.*[6] After the *Sebola* judgment there is a heavier burden on a credit provider to ensure that the notice is sent and delivered to the defaulting debtor. The credit provider has to prove on a balance of probabilities that the notice was delivered and came to the attention of the defaulting consumer.

2 The facts of *Sebola*

2.1 Introduction

The judgment was handed down on 7 June 2012 in the Constitutional Court by Judge Cameron. It concerns an application for leave to appeal against a full bench decision of the South Gauteng High Court. Standard Bank obtained default judgment against Mr and Mrs Sebola (consumers) after it had instituted action to declare the

3 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC).
4 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [87].
5 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [76]. See further Otto and Otto *National Credit Act Explained* (2013) 116.
6 *Rossouw v Firstrand Bank Ltd* 2010 6 SA 439 (SCA).

Sebolas' immovable property specifically executable.[7] An appeal against the judgment of a single judge of the same court was dismissed by a full bench of the High Court.[8] The High Court refused to grant the rescission application prepared by the Sebolas in September 2009. Both the single judge and the full bench had to deal with the question of whether or not a section 129(1) notice read with section 130 of the NCA requires that a defaulting consumer should actually receive the notice.

2.2 Background

Mr and Mrs Sebola signed a mortgage home loan agreement in November 2007 with Standard Bank and received a loan of R1 312 000.[9] Standard Bank secured the loan with a mortgage bond over the Sebolas' home. The Sebolas chose their home address in the mortgage home loan agreement for jurisdiction and address purposes to which "any legal proceeding" were to be served, and they declared that "letters, statements and notices may be delivered" to a post office box in North Riding.[10]

The Sebolas defaulted on their mortgage home loan agreement in 2009 by falling into arrears with their monthly bond payments.[11] The Bank sent a notice of default as required by section 129(1) of the NCA by registered post to the specified post office box in North Riding on 16 March 2009.[12] A summons was subsequently issued on 25 May 2009 in the South Gauteng High Court for the full outstanding amount of R1 156 092,30, including costs and interest.[13] The Sheriff confirmed on the return of service that the summons had been served on 27 May 2009 by affixing a copy to the Sebolas' front door, which was the chosen *domicilium.*[14]

The Registrar of the South Gauteng High Court granted default judgment against the Sebolas. This was done before the Constitutional Court judgment in *Gundwana v*

7 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [1].
8 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [1].
9 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [4].
10 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [4].
11 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [5].
12 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [5].
13 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [6].
14 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [6].

Steko Development,[15] where it was held that judicial oversight is necessary where an application is made for a sale in execution of mortgaged property against a judgment debtor's primary residence. A court may grant such an order only after all the relevant circumstances of the debtor have been taken into consideration.[16] The default judgment against the Sebolas was granted on 25 September 2009,[17] whereafter a writ of attachment was obtained on 17 November 2009. It was only at this stage that the Sebolas became aware of the judgment against them and applied for rescission of the default judgment.[18]

The Sebolas stated in their application for rescission of the default judgment that they had not received the section 129(1) notice or the summons issued by the Bank.[19] They proved this by attaching a post office "track and trace" record to their application that reflected that the notice had been received by the Halfway House post office instead of the North Riding post office.[20] Therefore the notice was delivered to the wrong post office by the postal services and the Sebolas could by no means have received the notice. The Sebolas further stated that they could not have received the served summons, because their home is situated in a housing development where no entry was given to any Sheriff on the day the return of service was indicated.[21] A single judge dismissed their application.

The Sebolas appealed to the full bench of the South Gauteng High Court.[22] The appeal was dismissed with costs by the full bench on 11 August 2011. The court relied on and held itself bound[23] by the decision in *Rossouw v Firstrand Bank,*[24] where it was held that proof of despatch by the credit provider to the consumer's chosen *domicillium* address is sufficient to comply with the requirements of section 129(1). Proof that the consumer had received the notice therefore was not required.

15 *Gundwana v Steko Development* 2011 3 SA 602 (CC).
16 See Van der Walt and Brits 2012 *THRHR* 322-329.
17 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [7].
18 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [7].
19 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [9].
20 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [5].
21 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [8].
22 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [11].
23 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [14].
24 *Rossouw v Firstrand Bank Ltd* 2010 6 SA 439 (SCA).

The Sebolas applied for leave to appeal to the Constitutional Court by submitting that the Supreme Court of Appeal failed to accord sufficient weight to constitutional principles in light of the NCA's objectives.[25] Leave to appeal was granted.

3 The judgment of *Sebola*

The Sebolas on appeal argued that the Bank had not complied with the notice requirements of section 129(1). The Constitutional Court therefore analysed this section of the NCA.

A credit agreement can be enforced in court by a credit provider only once the requirements of sections 129 and 130 have been adhered to. If a consumer is in default and a credit provider wants to enforce the credit agreement, section 129(1)(a) provides that the default may be drawn to the notice of the consumer in writing by the credit provider,[26] and section 129(1)(b)(i) provides (subject to section 130(2)) that a notice must be provided to a consumer, in accordance with section 129(1)(a) before a credit provider may commence with any legal proceedings to enforce the credit agreement. For a number of years there has been uncertainty[27] about the interpretation of section 129, and how it affects the execution procedure in the case of a mortgage bond over immovable property.

Before the purpose of a section 129(1) notice can be determined it is important to understand the purpose of the NCA. In *Standard Bank of South Africa Ltd v Hales*[28] it was held that the NCA must be interpreted with a well-balanced approach. When a court interprets any section of the NCA it must do so in a manner that gives effect to the objectives of the NCA.[29] This Act was implemented (i) to promote a fair and

25 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [17], [36].
26 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [45].
27 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [34]. See also Van Heerden and Coetzee 2012 *Litnet (Akademies) Regte* 256.
28 *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D) 322B-C.
29 Otto and Otto *National Credit Act Explained* (2013) 6-7; Otto and Otto *National Credit Act Explained* (2010) 6-7.

accessible credit market; (ii) to protect consumers;[30] and (iii) to ensure equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.[31]

The purpose of the NCA is pursued through the "consensual resolution of disputes arising from credit agreements".[32] 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 counselor, alternative dispute resolution agent, consumer court or ombud"[33] with the objective of reaching an agreement with the credit provider.[34]

The important question that had to be determined in *Sebola* was whether or not a credit provider should prove that the section 129(1) notice came to the notice (attention) of the consumer.[35] Judge Cameron emphasised that section 129(1) cannot be interpreted in isolation, but must be read with section 130(1)(a).[36] The judge referred to three issues which should be considered: First, a credit provider's obligations, on the one hand, and what he is permitted to do, on the other, cannot be established without interpreting both provisions.[37] Judge Cameron[38] explained that:

> Section 129 prescribes *what* a credit provider must prove (notice as contemplated) before judgment can be obtained, while section 130 sets out *how* this can be proved (by delivery).

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30 In *Rossouw v Firstrand Bank* 2010 6 SA 439 (SCA) 32 appeal judge Maya held that the legislator's main objective with the Act was to "protect the consumer from exploitation by credit providers by, *inter alia,* preventing predatory lending practices; to ameliorate the financial harm which a consumer may suffer where unable to meet his obligations under a credit agreement and generally to achieve equity in the lending market by levelling the playing field between parties who do not have equal bargaining power".

31 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [36]; s 3(d) of the NCA; see further Otto and Otto *National Credit Act Explained* (2013) 8; Otto and Otto *National Credit Act Explained* (2010) 108.

32 Section 3(h) of the NCA.

33 Section 3 of the NCA.

34 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [46].

35 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [57]. See further Otto and Otto *National Credit Act Explained* (2013) 115.

36 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [52], [56]-[57], [59].

37 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [53].

38 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [54].

Secondly, both sections require that written "notice" must be given to a consumer, but do so in different ways.[39] Section 129(1)(a) provides that a credit provider "may" "draw the default to the notice of the consumer"[40] and section 129(1)(b) provides that a credit provider "may not commence legal proceedings" to enforce the credit agreement before a notice as contemplated in section 129(1)(a) has been provided to the consumer. Section 130(1) provides that 10 business days must pass from the time that "the credit provider "delivered" a notice to the consumer as contemplated … in section 129(1)" before a credit provider is allowed to commence with court proceedings to enforce the credit agreement.[41] Section 130(1)(a) explicitly refers back to section 129(1).[42] The third important issue is that the two sections have different focuses but achieve the same end result, namely, the delivery of a notice to a defaulting consumer as contemplated in section 129(1). Section 129(1)(a) focuses on the defaulting *consumer* and entitles him to a "notice" with a specific content – the credit provider therefore "may" provide him with such a notice. Section 129(1)(b) obliges the credit provider to give such notice because he "may not" commence with proceedings against a defaulting consumer unless this notice has been given,[43] while section 130(1) places an obligation on the *notice-provider* to "deliver" such a section 129(1) notice.[44] Judge Cameron[45] gave the following substantiation of his conclusion that a credit provider must "deliver" such a notice to a consumer:

> No means of direct proof lies within the reach of a credit provider who wishes to enforce an agreement. It is for this reason that section 130 imposes on the credit provider the obligation to 'deliver' the notice.

Therefore, when a credit provider has given notice to a consumer in terms of section 129(1), he must provide proof and satisfy a court that this notice was "delivered" to the consumer. Judge Cameron[46] admitted that determining the meaning of

39 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [54].
40 Section 129(1)(a) of the NCA.
41 Section 130(1)(a) of the NCA.
42 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [54].
43 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [55], [72].
44 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [55], [57], [72].
45 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [57].
46 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [61].

"delivered" in section 130(1)(a) is not an easy task with a clear answer. Neither the NCA nor section 130(1)(a) gives a definition of the word "delivered". The court, however, found some indications in section 65(1) and 65(2)[47] of the NCA, which provides as follows:

> Section 65 Right to receive documents
> (1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any. (2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must - (*a*) *make the document available to the consumer* through one or more of the following mechanisms - (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail; (ii) by fax; (iii) by email; or (iv) by printable web-page; *and* (*b*) *deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a)* (*National Credit Act* 34 of 2005). [My emphasis]

Section 65(2) assists in the quest of determining the meaning of "delivered" mentioned in section 130(1), because it is applicable in circumstances where "no method has been prescribed for the delivery of a particular document to a consumer" as in section 130(1).[48] Section 65(2) points out that "if no method has been prescribed for the delivery of a particular document to a consumer", the document must be made "available" to the consumer through one of the mechanisms provided in section 65(2)(a) by the person who is obliged to deliver the document.[49]

Although registered mail is not given as one of the modes of delivery in section 65(2), the Constitutional Court confirmed *Rossouw v Firstrand Bank Ltd,*[50] where it was held that section 65(2) also covers delivery per registered mail.[51] Appeal judge Maya in *Rossouw v Firstrand Bank Ltd*[52] pointed out that registered mail is a "more

47 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [63]. See further Otto and Otto *National Credit Act Explained* (2013) 115-116.
48 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [66].
49 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [67].
50 *Rossouw v Firstrand Bank* 2010 6 SA 439 (SCA) 29-30.
51 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [68]. See also Otto and Otto *National Credit Act Explained* (2013) 115; Van Heerden and Coetzee 2012 *Litnet (Akademies) Regte* 256.
52 *Rossouw v Firstrand Bank* 2010 6 SA 439 (SCA) 30.

reliable means" than ordinary mail, since there is no practical way to prove that a document sent by ordinary mail has been received by the addressee. The judge therefore concluded that the despatch of a section 129(1) notice by registered mail to a specified address is required for delivery in terms of section 130(1)(a). Judge Cameron[53] agreed with this point of view but added that more weight and certainty needs to be attached to section 130(1)(a) read in conjunction with section 129(1). To comply with the requirements of these sections, more than mere "despatch" of the notice is necessary. Bearing in mind the high importance given to a section 129(1) notice, the judge held that for a section 129(1) notice to be effective, the credit provider should take reasonable measures to bring the notice to the attention of the consumer. He must therefore present proof that the notice "on a balance of probability reached the consumer".[54] The judge held that this will normally mean that a "credit provider must provide proof that the notice was delivered to the correct post office".[55]

In practical terms this means that a credit provider will have to acquire a post-despatch "track and trace" print-out from South Africa's Post Office website.[56] This "track and trace" print-out will enable the credit provider to determine which post office received the notice that was sent by registered mail. The credit provider's summons or particulars of claim must declare that the notice was delivered to the applicable post office and that the notification slip was delivered to the consumer. Such a notification slip notifies a consumer that a registered item was received for his collection.[57] Should a consumer aver that the notification slip sent by the post office was not received or was not collected, a court must determine, regardless of

53 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [68], [72]. See further Van Heerden and Coetzee 2012 *Litnet (Akademies) Regte* 256.

54 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [74]-[75].

55 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [75].

56 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [76]. Judge Cameron anticipated that some uncertainty may occur in the lower courts after this judgment, and therefore gave useful practical guidelines in [76]-[79], [86]-[87] to credit providers to avoid any uncertainty when the increased burden of proof needs to be satisfied. These guidelines will assist a credit provider to deliver an effective section 129(1) notice which will comply with the NCA.

57 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [77].

the credit provider's proven averments, if the consumer's statement could be true, in which case the court proceedings must be suspended.[58]

Applying this interpretation of sections 129(1) and 130(1)(a) to the facts of the case, the court found that the Sebolas agreed in their mortgage bond that documents could be delivered by normal post to their North Riding post box.[59] The Bank delivered the notice to the Sebolas' North Riding post office and therefore complied with the bond agreement. However, it had a further obligation to prove that the notice had been received by the correct post office.[60] The Bank was unable to prove that the notice reached the relevant post office. Consequently the court rescinded the judgment against the Sebolas, and the court proceedings were suspended until the Bank corrected its omission.[61] Leave to appeal was granted and the appeal succeeded. The order of the High Court was set aside and was replaced with the following order: "The application for rescission of the default judgment is granted with costs".[62]

4 Conclusion

This very important judgment by Judge Cameron overturned the judgment of the Supreme Court of Appeal in *Rossouw v Firstrand Bank Ltd.*[63] To my mind *Rossouw* followed a more reasonable approach to the section 129(1) notice and provide more certainty on the section 129(1) notice requirement.[64] It held that if a section 129(1) notice is sent per registered post, proof that the notice has reached the correct post office (as recorded in the credit agreement by the parties) will be sufficient proof of delivery to the consumer and therefore will comply with the requirements of section 129(1). The *Sebola* judgment confirms the *Rossouw* judgment but adds an

58 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [79], [87]. In terms of s 130(4)(b) the court will be adjourned.
59 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [80].
60 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [81].
61 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [81].
62 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [89].
63 *Rossouw v Firstrand Bank* 2010 6 SA 439 (SCA).
64 See also Van Heerden and Coetzee 2012 *Litnet (Akademies) Regte* 285; Eiselen *Unpublished Bulletin*.

additional evidentiary requirement, namely that proof needs to be provided that the section 129(1) notice (i) has been despatched to the consumer's chosen address and (ii) that the notice reached the appropriate post office for delivery to the consumer, thereby coming to the attention of the consumer.[65] The *Sebola* judgment can be summarised as follows:

> Section 129(1)(a) requires a credit provider, *before commencing any legal proceedings to enforce a credit agreement*, to draw the default to the *notice of the consumer* in writing. It has been described as a 'gateway' provision, or a 'new pre-litigation layer to the enforcement process' (*Nedbank v National Credit Regulator* 2011 3 SA 581 (SCA) para 8). Although section 129(1)(a) says the credit provider 'may' draw the consumer's default to his or her notice, section 129(1)(b)(i) precludes the commencement of legal proceedings *unless notice is first given* [*sic*]. So, in effect, *the notice is compulsory* (2012 5 SA 142 (CC) para 54). The requirement that a credit provider provide notice in terms of section 129(1)(a) to the consumer must be understood in conjunction with section 130, which requires delivery of the notice. The statute, though giving no clear meaning to 'deliver', requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer. Where the credit provider post [*sic]* the notice, proof of registered despatch 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 contrary indication constitute sufficient proof of delivery.[66] [My emphasis]

If a consumer avers that he did not receive a section 129(1) notice, proceedings will be stayed and will resume only after the steps that a credit provider should follow have been complied with.[67] Therefore non-compliance with the requirements of section 129(1) notices will not be fatal, but will only delay court proceedings. Eiselen[68] argues that to enable a credit provider to comply with this heavier onus, all section 129(1) notices must be delivered by registered post. I agree with Eiselen and should like to add that if delivery by registered post is sanctioned as one of the methods of delivery by the consumer, the credit provider should also make an extra effort to deliver the notice by ordinary post to the consumer's *domicilium* address. Such a notice will then serve as delivery to a consumer who ignores the notification by registered letter. It is clear that compliance with section 129(1) is of the utmost

65 *ABSA Bank Ltd v Mkhize* 2012 5 SA 574 (KZD) 50, 53, 55-56, 58.

66 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [87]. See Otto and Otto *National Credit Act Explained* (2013) 116-117.

67 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) [87].

68 Eiselen *Unpublished Bulletin*.

importance. Therefore, when a credit provider increases the probabilities of the notice coming to the attention of the consumer, the chances of compliance improve.

Both Eiselen[69] and Otto and Otto[70] made the following suggestions that will assist a credit provider when the requirements of *Sebola* need to be followed. First, when proceedings are stayed due to non-compliance with section 129(1), at least 10 days should pass before a credit provider attempts to deliver a notice again. Secondly, when proceedings are stayed and a consumer decides to refer the matter to a debt counsellor in terms of section 129(1)(a), such proceedings should not resume before that procedure has been completed.[71] Eiselen[72] suggests that a credit provider can reduce the increased burden of proof by providing alternative mechanisms for delivery of a section 129(1) notice in the credit agreement, such as e-mail or fax.[73]

A credit provider who declares in his summons or particulars of claim that a section 129(1) notice was delivered to the consumer is making a very bold assertion. A court should therefore first determine if the notice was indeed "delivered" in terms of the NCA. A credit provider should specify the method/s of delivery which he followed in the summons or particulars of claim to eliminate any speculation about whether or not he complied with the requirements of the NCA.[74]

In commenting on the *Sebola* judgment both Van Heerden and Coetzee[75] and Otto and Otto[76] come to the conclusion that the Constitutional Court went too far with the additional compliance requirement for notice in terms of section 129(1). They state that the *Sebola* judgment does not contribute to legal certainty in this regard. This is

69 Eiselen *Unpublished Bulletin*.
70 Otto and Otto *National Credit Act Explained* (2013) 114; Otto and Otto *National Credit Act Explained* (2010) 108-109.
71 Eiselen *Unpublished Bulletin*.
72 Eiselen *Unpublished Bulletin*.
73 When a section 129(1) notice is sent by e-mail or fax to the defaulting consumer, the time of despatch and delivery can be confirmed by a confirmation e-mail (when sent by e-mail) or print-out (when sent by fax).
74 See s 65(1) and (2) of the NCA.
75 Van Heerden and Coetzee 2012 *Litnet (Akademies) Regte* 256, 285.
76 Otto and Otto *National Credit Act Explained* (2013) 117-118.

confirmed by the contradictory high court decision in *Mkhize.*[77] In this judgment the court held that ordinary mail is more reliable than registered mail, since the percentage of registered mail that is returned undelivered is much higher than ordinary mail. This view differs from conclusion in *Sebola* that registered mail is more reliable than ordinary mail. The authors agree with the viewpoint in *Mkhize* that held that when a section 129(1) notice was sent with registered post and the delivery was unsuccessful due to the consumer not collecting the letter, "there is a high degree of probability that the consumer has avoided delivery". Consequently the reason why registered mail will more frequently be returned undelivered might be the consumer's "avoidance tactic", which places a credit provider in a very difficult position. The authors therefore argue that the Constitutional Court in effect left a door open for consumers to avoid receipt of the section 129(1) notice, and in doing so to circumvent the enforcement of the credit agreement. The additional compliance requirement of the *Sebola* judgment is superfluous and complicates the interpretation of the NCA in that it does not take into consideration the well-balanced approach required when interpreting the act. Otto and Otto argue that this additional compliance required by *Sebola* "will only create more headaches for banks and other credit providers". Van Heerden and Coetzee agree with Otto and Otto that the section 129(1) notice requirements urgently need to be revised and amended by the legislator to obviate a credit provider's reluctance when awarding credit, and to minimise increase in the costs of credit that could arise as a result of the additional burden. Such revision would also contribute to legal certainty and avert unnecessary evidential headaches. Otto and Otto accept that consumer protection comes at a price, but argue that after *Sebola* this protection is stretched to breaking point. They state that the additional burden of proof does not promote an "effective and accessible credit market and industry".[78]

In conclusion, I agree with these authors that the Constitutional Court overreached the boundary of compliance with the section 129(1) notice requirements. It seems that the Constitutional Court lost sight of the requirement that a balanced approach

[77] *ABSA Bank Ltd v Mkhize* 2012 5 SA 574 (KZN) 34-35, 66.

[78] Otto and Otto *National Credit Act Explained* (2013) 118. See further Van Heerden and Coetzee 2012 *Litnet (Akademies) Regte* 284, 286.

must be followed in interpreting the NCA, and tipped the scale in favour of defaulting consumers.[79] I am of the opinion that when a court interprets the requirements for compliance with section 129(1) the interests of both the credit provider and the consumer must always be equally balanced on an "imperceptible scale" so that both parties might enjoy equal protection from the NCA. The interpretation in *Sebola* places an additional burden of proof on a credit provider and will probably increase the cost of credit, which in turn would affect the pockets of consumers. Mortgagees who wish to foreclose on their mortgage bonds are obviously seriously affected by this interpretation and will possibly also discount the cost of the additional burden in their bond costs.

[79] See Otto and Otto's statement that a credit provider also has legal interests that are entitled to protection in Otto and Otto *National Credit Act Explained* (2013) 8.

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List of abbreviations

NCA	*National Credit Act* 34 of 2005
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg