CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 65/13

In the matter between:

MOSHOMO LEVIN KUBYANA Applicant

and

STANDARD BANK OF SOUTH AFRICA LTD Respondent

and

SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA Amicus Curiae

Neutral citation: *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1

Coram: Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Jafta J, Froneman J, Madlanga J, Mhlantla AJ, Nkabinde J, Van der Westhuizen J and Zondo J

Heard on: 7 November 2013

Decided on: 20 February 2014

Summary: National Credit Act 34 of 2005 – section 129 – notice of default – obligation to deliver.
Consumer's election on manner of delivery of notices – credit provider must respect that election – delivery amounts to the taking of steps that would bring the notice to the attention of a reasonable consumer – consumer may not claim non-delivery of notice if she has been unreasonably remiss in failing to engage with the notice.

ORDER

On appeal from the North Gauteng High Court, Pretoria (Ledwaba J):

1. Leave to appeal is granted.

2. The appeal is dismissed.

3. There is no order as to costs.

JUDGMENT

MHLANTLA AJ (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Madlanga J and Van der Westhuizen J concurring):

Introduction

[1] What are the steps that a credit provider must take in order to ensure that a notice of default reaches a consumer before it may commence litigation? What must a credit provider prove in order to satisfy a court that it has discharged its obligation to effect proper delivery of a statutory notice? These are the issues we are required to determine in this matter, which comes before us as an application for leave to appeal wherein the applicant challenges a decision of the North Gauteng High Court, Pretoria (High Court).

Background

[2] In November 2007 the applicant (Mr Kubyana) and the respondent (Standard Bank) entered into an agreement regulated by the National Credit Act,[1] in terms of which Mr Kubyana purchased a motor vehicle and was obliged to pay off the purchase price in 60 monthly instalments of R2 501,25 each. He chose an address as his *domicilium citandi et executandi*[2] for purposes of all notices and correspondence sent by Standard Bank in relation to the instalment sale agreement.

[3] On a number of occasions between October 2008 and July 2010 Mr Kubyana fell into arrears with his payments. Standard Bank attempted to bring this to his attention in various ways. It contacted him by telephone on numerous occasions, and during these conversations he made promises to settle his outstanding debt.[3] Standard Bank also attempted to discuss Mr Kubyana's indebtedness with him at his workplace. Its employees twice attempted to visit him there, to no avail.

[4] Thereafter Mr Kubyana's account consistently remained in arrears for a number of months. On 15 July 2010 Standard Bank sent him a notice in terms of section 129(1) of the Act,[4] setting out his statutory rights and requesting him to pay

[1] 34 of 2005 (Act).

[2] That is, an address for the purposes of being cited in litigation and for the execution of legal process.

[3] During oral argument counsel for Mr Kubyana contended that Standard Bank's calls to Mr Kubyana went unanswered. It is apparent from the record that this is incorrect.

[4] That provision is set out in [23] below. In essence it requires a credit provider to notify a consumer who is in default of her rights under the Act before commencing legal proceedings to enforce the relevant credit agreement against that consumer.

his outstanding debts. The notice was sent by registered mail to the address nominated by Mr Kubyana in the instalment sale agreement.

[5] According to the track and trace report[5] from the Post Office, the notice reached the Pretoria North Post Office on 20 July 2010. On the same day the Post Office sent a notification to the address nominated by Mr Kubyana, informing him that an item had been sent by registered mail and was awaiting his collection. He failed to collect the registered item (the section 129 notice). Seven days later a second notification was sent to him. Again he did not respond and the notice remained at the Pretoria North Post Office. On 1 September 2010 the Post Office returned the unclaimed section 129 notice to Standard Bank.

Litigation history

[6] On 28 September 2010 Standard Bank issued summons against Mr Kubyana for the cancellation of the instalment sale agreement, the return of the motor vehicle and the payment of damages. Mr Kubyana filed a special plea that the High Court had no jurisdiction to hear the matter because Standard Bank had failed to comply with its obligations in terms of section 129 of the Act, as well as the terms of the instalment sale agreement, as his account had not been in arrears when the notice was sent. He subsequently averred that he did not receive the notice until he was served with the summons.

[5] This is a document, available from the Post Office, which indicates when a registered item arrives at a particular branch of the Post Office for collection by the intended recipient. It also indicates whether the item was collected or returned to the sender.

[7] The matter proceeded to trial in the High Court before Ledwaba J. Mr Kubyana was legally represented and the dispute was fully ventilated. Standard Bank adduced evidence to establish that: Mr Kubyana's account was and had been in arrears; it had taken steps to bring this to his attention; the section 129 notice had been sent via registered post to the address nominated by Mr Kubyana in the instalment sale agreement; the notice had reached the correct branch of the Post Office; and the notification from the Post Office had been sent to Mr Kubyana's address. Though present, Mr Kubyana did not testify or provide an explanation for his failure to collect the section 129 notice.

[8] The High Court upheld Standard Bank's claim, finding that it had no obligation to use additional means to ensure that Mr Kubyana received the section 129 notice.[6] It concluded that Mr Kubyana had a duty to explain why the notice did not reach him notwithstanding Standard Bank's efforts, and that his failure to do so had to count against him.[7]

[9] The Supreme Court of Appeal dismissed Mr Kubyana's application for leave to appeal against the decision of Ledwaba J. He now seeks leave to appeal to this Court.

[6] *Standard Bank of South Africa Ltd v Kubyana* [2012] ZAGPPHC 259 (High Court judgment) at paras 34-5.

[7] Id at paras 31-2 and 34-5.

Submissions in this Court

[10] In his papers Mr Kubyana set out various grounds of appeal, including a claim that Standard Bank had breached section 106 of the Act[8] by impermissibly debiting his account with insurance premiums and an allegation that the proceedings before the High Court were unfair and in breach of section 34 of the Constitution.[9] After Mr Kubyana filed his papers but before the hearing, the Socio-Economic Rights Institute of South Africa (SERI) was admitted as a friend of the court (amicus

[8] Subsections (4) and (5) thereof read as follows:

> "(4) If the credit provider proposes to the consumer the purchase of a particular policy of credit insurance as contemplated in subsection (1) or (3)—
>
> (a) the consumer must be given, and be informed of, the right to waive that proposed policy and substitute a policy of the consumer's own choice, subject to subsection (6);
>
> (b) such policy must provide for payment of premiums by the consumer—
>
> (i) on a monthly basis in the case of small and intermediate agreements; or
>
> (ii) on a monthly or annual basis in the case of large agreements, for the duration of the credit agreement; and
>
> (c) in the case of an annual premium the premium must be recovered from the consumer within the applicable year.
>
> (5) With respect to any policy of insurance arranged by a credit provider as contemplated in subsection (4), the credit provider must—
>
> (a) not add any surcharge, fee or additional premium above the actual cost of insurance arranged by that credit provider;
>
> (b) disclose to the consumer in the prescribed manner and form—
>
> (i) the cost to the consumer of any insurance supplied; and
>
> (ii) the amount of any fee, commission, remuneration or benefit receivable by the credit provider, in relation to that insurance;
>
> (c) explain the terms and conditions of the insurance policy to the consumer and provide the consumer with a copy of that policy; and
>
> (d) be a loss payee under the policy up to the settlement value at the occurrence of an insured contingency only and any remaining proceeds of the policy must be paid to the consumer."

[9] The section, entitled "Access to courts", reads as follows:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

curiae).[10] The Registrar of this Court was subsequently informed that counsel for SERI would present oral argument on Mr Kubyana's behalf, which he duly did. During the hearing the contentions regarding section 34 of the Constitution and section 106 of the Act were abandoned. Mr Kubyana's case narrowed considerably and he now asserts only two grounds of appeal.

[11] First, relying on this Court's judgment in *Sebola*,[11] Mr Kubyana contends that, if there is evidence that a section 129 notice was sent by registered post but was returned to the credit provider unclaimed, this shows that there has not been proper delivery as required by the Act as it indicates that the notice has not come to the attention of the consumer for whom it was intended.[12] In that event, a court hearing the dispute must adjourn the proceedings as contemplated in section 130(4)(b) of the Act[13] and cannot grant judgment. In the circumstances of this case, Mr Kubyana contends that the fact that the section 129 notice was returned to Standard Bank uncollected constituted an indication contradicting the inference of proper delivery. Judgment therefore ought not to have been granted in Standard Bank's favour. Second, Mr Kubyana relies on sections 8(3), 32(1)(b) and 39(2) of the Constitution[14]

[10] SERI is a non-profit company. It provides socio-economic rights assistance to individuals, communities and social movements in South Africa. It also has a history of engaging on issues concerning the Act. See, for example, its contribution in *Sebola* below n 11 at paras 23, 47-8, 51 and 54.

[11] *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (*Sebola*).

[12] In other words, such a return constitutes a "contrary indication" as envisaged in *Sebola* above n 11 at para 77. I deal with this concept more fully in [49]-[53] below.

[13] That provision is set out in full in [25] below. In essence it requires a court hearing an application for the enforcement of a credit agreement to adjourn proceedings if a credit provider has failed to comply with sections 127, 129 or 131 of the Act. The adjournment is granted to allow the credit provider time to rectify its failure before it may enforce the debt.

[14] Section 8(3) reads as follows:

(read with sections 129 and 130 of the Act) and argues that he is entitled to information held by another person if that information is required for the exercise or protection of his rights. He submits that his constitutional right to receive information was infringed when he did not receive delivery of the section 129 notice, as that notice contained information necessary for the exercise of his rights under the Act.

[12] In response to Mr Kubyana's first argument, Standard Bank argues that, once it is proven that the section 129 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 consumer. This satisfies the requirements of the Act. The burden of rebuttal then shifts to the consumer to assert that the notice did not reach her and to invite the court to make a finding in relation thereto. To place additional requirements on the credit provider would impose too onerous a burden and would afford consumers the undue advantage of being able to ignore validly sent notices with impunity.

> "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
>
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
>
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

Section 32, entitled "Access to information", reads as follows:

> (1) Everyone has the right of access to—
>
> (a) any information held by the state; and
>
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
>
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

Section 39(2) reads as follows:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[13] Regarding Mr Kubyana's access to information argument, Standard Bank contends that his reliance on section 32(1)(b) of the Constitution is misplaced because section 32(1)(b) is realised through the Promotion of Access to Information Act.[15] In the circumstances of this case he has no cause of action under that statute, so the argument goes, because he made no formal request for information in terms of PAIA and therefore never engaged its protections. Moreover, Standard Bank contends that it regularly kept Mr Kubyana informed of the state of his account and cannot be said to have deprived him of relevant information.

[14] SERI submits that, in the light of *Sebola*, the crucial question for determination in a dispute such as the present one is whether, as a matter of fact, the section 129 notice came to the attention of the consumer. Why it may not have done so is irrelevant, for the Act does not require an enquiry into subjective factors such as a consumer's culpability for not receiving notices. On the undisputed facts, SERI contends it is clear that the section 129 notice did not reach Mr Kubyana: it was never collected by him from the Pretoria North Post Office and was returned to Standard Bank unclaimed. Accordingly, there was no compliance with section 129 of the Act. SERI contends that the High Court therefore ought to have adjourned the trial and directed Standard Bank to take further steps to ensure that the section 129 notice reached Mr Kubyana.

[15] 2 of 2000 (PAIA).

Issues

[15] In this matter we are required to—

(a) determine whether leave to appeal should be granted;

(b) interpret section 129 of the Act and identify its requirements;

(c) clarify the meaning and implications of *Sebola* and its application to this case; and

(d) determine an appropriate costs order.

Leave to appeal

[16] It is by now trite that this Court will hear a matter that raises a constitutional issue if the interests of justice so require.[16] As previously explained, the interpretation of the Act's notice provisions implicates fundamental notions of equity in, and the transformation of, the credit market. Such an interpretation is therefore inherently linked to the constitutional objective of achieving substantive equality.[17] This matter thus gives rise to a constitutional issue.

[17] This case concerns the proper interpretation of a statute that regulates commercial activity undertaken by many people and institutions on a daily basis. The issues at stake are therefore of fundamental importance to many South Africans.[18] Furthermore, this matter requires us to clarify the scope and application of *Sebola*. As

[16] See section 167(3)(b)(i) read with section 167(6) of the Constitution. See also *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 at para 4 and *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39 at para 22.

[17] *Sebola* above n 11 at para 36.

[18] Id at para 34.

is apparent from the law reports, there are a number of conflicting superior court decisions dealing with the meaning of section 129 of the Act and the interpretation of that provision by this Court in *Sebola.*[19] It is imperative for purposes of certainty and the proper functioning of the marketplace that we identify the rights and obligations of both credit providers and consumers under the Act and specifically under section 129. In sum, this matter implicates constitutional issues that the interests of justice require us to determine. Leave to appeal is therefore granted.

The interpretation of section 129 of the Act

[18] It is well established that statutes must be interpreted with due regard to their purpose and within their context.[20] This general principle is buttressed by section 2(1) of the Act, which expressly requires a purposive approach to the statute's construction.[21] Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms.[22] However, that does not mean that ordinary meaning and clear language may

[19] *ABSA Bank Ltd v Mkhize and Another; ABSA Bank Ltd v Chetty; ABSA Bank Ltd v Mlipha* [2013] ZASCA 139; *Balkind v ABSA Bank* [2012] ZAECGHC 102; 2013 (2) SA 486 (ECG); *ABSA Bank Ltd v Petersen* [2012] ZAWCHC 168; 2013 (1) SA 481 (WCC); *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* [2012] ZAKZDHC 38; 2012 (5) SA 574 (KZD); and *Nedbank Ltd v Binneman and Thirteen Similar Cases* [2012] ZAWCHC 141; 2012 (5) SA 569 (WCC).

[20] See *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 61 and *Mistry v Interim Medical and Dental Council of South Africa and Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at paras 17-8.

[21] Section 2(1) states that "[t]his Act must be interpreted in a manner that gives effect to the purposes set out in section 3." I set out those purposes in [19]-[21] below.

[22] See generally *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament.[23]

[19] The historical context and purpose of the Act were set out in detail in *Sebola*.[24] It suffices to emphasise the following points. The Act is a legislative effort to regulate and improve relations between consumers and providers of credit. The main purposes of the Act are "to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers".[25]

[20] There can be no doubt that the Act is directed at consumer protection.[26] However, this should not be taken to mean that the Act is relentlessly one-sided and concerned with nothing more than devolving rights and benefits on consumers without any regard for the interests of credit providers. No. For just as the Act seeks to

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[23] In *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) Kentridge AJ, at paras 17-8, stated:

> "I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.
>
> We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

While these remarks referred to constitutional interpretation, they apply even more forcefully in relation to statutory interpretation generally. See also *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 23-4 and 26.

[24] Above n 11 at paras 38-42.

[25] Section 3 of the Act.

[26] In express terms section 3 states that the aforementioned purposes are to be achieved by developing a credit market that is accessible to those for whom it has been historically inaccessible (section 3(a)), discouraging the provision of reckless credit by credit providers (section 3(c)(ii)) and correcting prevailing disparities in negotiating power between consumers and credit providers (section 3(e)). See *Sebola* above n 11 at paras 38-40.

protect consumers, so too does it seek to promote a competitive, sustainable, efficient and effective credit industry. This objective is to be attained by promoting responsibility in the credit market;[27] "encouraging responsible borrowing [and the] fulfilment of financial obligations by consumers";[28] discouraging contractual default;[29] and adhering to a debt-enforcement system that prioritises "the eventual satisfaction of all responsible consumer obligations under credit agreements."[30]

[21] Thus, the promotion of equity in the credit market is to be achieved by balancing the respective rights and responsibilities of credit providers and consumers.[31] It follows that the correct interpretation of section 129 is one that strikes an appropriate balance between the competing interests of both parties to a credit agreement.

[22] It is also fitting to have regard to section 129 in particular.[32] This section sets out the procedures a credit provider must follow before enforcing a debt. Its purpose is two-fold. First, it serves to ensure that the attention of the consumer is sufficiently drawn to her default. Second, it enables the consumer to be empowered with knowledge of the variety of options she may utilise in order to remedy that default.[33]

[27] Section 3(c) of the Act.

[28] Id section 3(c)(i).

[29] Id section 3(c)(ii).

[30] Id section 3(i). See *Sebola* above n 11 at para 40.

[31] Section 3(d) of the Act. See *Sebola* above n 11 at para 40.

[32] The text of subsection (1) is set out in [23] below.

[33] For example, seeking the assistance of a debt counsellor with a view to debt restructuring, or seeking recourse to a consumer ombud for the non-litigious resolution of any dispute with the credit provider.

As explained in *Sebola*, the aim of the provision is to facilitate the consensual resolution of credit agreement disputes.[34] It is important to emphasise this consensuality – both the credit provider *and* the consumer have responsibilities to bear if the dispute is to be resolved without recourse to litigation.

[23] This exposition of the aims and objects of the Act will inform our understanding of its particular provisions. However, interpretation is about giving meaning to words, and it is therefore appropriate to commence the interpretive exercise by considering the language of the statute. In this matter we are primarily concerned with section 129 of the Act, which is entitled "Required procedures before debt enforcement". Subsection (1) reads:

> "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), or in section 86(10), as the case may be; and
>
> (ii) meeting any further requirements set out in section 130."

[24] Although subsection (1)(a) is framed in permissive language ("the credit provider *may*"), subsection (1)(b) is expressed in peremptory terms: legal proceedings

[34] Above n 11 at para 46. In support of this conclusion Cameron J relied on section 3(h) of the Act, which states that one of the means of achieving the purposes of the Act is the provision of "a consistent and accessible system of consensual resolution of disputes arising from credit agreements".

for the enforcement of a credit agreement "*may not* commence" until the section 129 notice has been provided to the consumer.[35] Proper dispatch of the section 129 notice is therefore essential for a credit provider that wishes to enforce its rights against a defaulting consumer in the courts.[36]

[25] In *Sebola* this Court held[37] that section 129(1) must be read in conjunction with the relevant provisions of section 130, which is entitled "Debt procedures in a Court". The relevant provisions of section 130 read:

> "(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and—
>
> (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(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.
>
> . . .
>
> (3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act

[35] See *Sebola* above n 11 at para 45.

[36] Although this is subject to a proviso contained in section 130(2) of the Act, that proviso is not relevant for purposes of this case.

[37] Above n 11 at para 52.

> applies, the court may determine the matter only if the court is satisfied that—
>
> (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;
>
> . . . .
>
> (4) In any proceedings contemplated in this section, if the court determines that—
>
> . . .
>
> (b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a) . . . the court must—
>
> (i) adjourn the matter before it; and
>
> (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed".

[26] As explained in *Sebola*, section 129 prescribes *what* the credit provider must do: indicate in writing to the relevant consumer that she is in default and that she has certain statutory remedies available to her in order to satisfy her outstanding debts without recourse to litigation. Section 130, on the other hand, sets out *how* the credit provider must discharge this obligation: deliver a written notice to the consumer as required by the statute.[38] The crucial question is: what must a credit provider do in order to meet the standard prescribed by the Act for the delivery of a section 129 notice?

[27] Unfortunately, the definition section and sections 129 and 130 are of little assistance in giving content to this obligation, as they make no prescriptions regarding the acceptable modes of delivery under the statute. We must have regard to

[38] Id at paras 55-6. At para 53 Cameron J concluded that "[s]ection 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)." (Emphasis in original.)

sections 65, 96 and 168, for it is only these three provisions that deal with the delivery of documentation under the Act. Section 65 is entitled "Right to receive documents". Subsections (1) and (2) state:

> "(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)."[39]

[28] Section 96, entitled "Address for notice", reads:

> "(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 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).

[39] Section 65(1) does not assist us, for "prescribed" means "prescribed by regulation" and the regulations promulgated under the Act are of no assistance with regard to the delivery of section 129 notices. See *Sebola* above n 11 at para 62.

> (2) A party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered mail, or electronic mail, if that other party has provided an email address."

[29] Finally, section 168, entitled "Serving documents", states the following:

> "Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either—
> (a) delivered to that person; or
> (b) sent by registered mail to that person's last known address."

[30] Section 65 specifies that documents delivered under the Act must be made available to the recipient through one or more of a number of enumerated mechanisms. If the consumer has chosen a particular mode of delivery from the enumerated options, the document must be delivered in accordance with that election. Section 96 provides that legal notices must be delivered to the address of the other party set out in the agreement or to the address most recently provided by the recipient where she has given written notice of a change in the address set out in the agreement. Finally, section 168 specifies how notices, orders and other documents under the Act are to be served where the method of delivery is not otherwise specified.

[31] These statutory provisions were comprehensively treated in *Sebola*[40] and I agree with what was stated there. For present purposes three features merit emphasis. First, there is no general requirement that the notice be brought to the consumer's subjective attention by the credit provider, or that personal service on the consumer is

[40] Above n 11 at paras 62-72.

necessary for valid delivery under the Act.[41] I am minded to agree with the High Court that, had the legislation meant either of these aspects to be a necessary condition for delivery, express provision would have been made for them.[42] Thus, while the section 129 obligation on the credit provider is to "draw the default to the notice of the consumer in writing", this obligation is discharged, in the words of section 65(2), by "[making] the document available to the consumer". This accords with section 130(1)(b)(i), which provides that a credit provider may seek to enforce its rights if a consumer has not responded to a section 129 notice. While a credit provider must take certain steps to ensure that a consumer is adequately informed of her rights, such a credit provider cannot be non-suited or hamstrung if the consumer unreasonably fails to engage with or make use of the information provided. In other words, it is the use of an acceptable mode of delivery – the taking of certain steps to apprise the consumer of the notice – which the statute requires of the credit provider, not the bringing of the contents of the section 129 notice to the consumer's subjective attention.

[32] Second, one of the acceptable modes of delivery is by means of the postal service:

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

[41] Id at para 74.

[42] See the High Court judgment above n 6 at para 27.

> will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office."[43]

When a consumer has elected to receive notices by way of post, the credit provider's obligation to deliver thus ordinarily consists of (a) respecting the consumer's election; (b) undertaking the additional expense of sending notices by way of registered rather than ordinary mail; and (c) ensuring that any notice is sent to the correct branch of the Post Office for the consumer's collection.

[33] Third, the steps that a credit provider must take in order to effect delivery are those that would bring the section 129 notice to the attention of a reasonable consumer.[44] This requirement is premised on the "especial importance" and the "pivotal significance" of the notice[45] as understood in the light of the Act's objectives regarding consumer protection. In order to give effect to that importance and achieve those objectives, the Legislature has elected to impose on credit providers obligations that would not otherwise arise.[46] Indeed, if "delivery" is interpreted to mean that a reasonable consumer would still not receive the section 129 notice, that interpretation would undermine the Act's "innovative entrenchment of court-avoidant and settlement-friendly processes"[47] and would only provide protection for exceptional

[43] *Sebola* above n 11 at para 75.

[44] Id at paras 75 and 77.

[45] Id at paras 70 and 73.

[46] For example, the common law of contract does not prescribe that all notices sent in relation to an agreement, in order to have been validly delivered, must be sent by way of registered mail. See *Sebola* above n 11 at paras 82-3.

[47] *Sebola* above n 11 at para 72.

consumers. As the Court explained in *Sebola*, for there to have been delivery under the Act it must be the case that—

> "it may reasonably be assumed . . . that notification of [the] arrival [of the section 129 notice at the Post Office] reached the consumer and that a reasonable consumer would have ensured retrieval of the item".[48]

[34] I now consider the purpose of the section 129 notice and the obligations of a reasonable consumer. 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. However, this form of dispute resolution is possible only if both parties come to the table: the credit provider must avoid hasty recourse to litigation and the consumer must seek to rectify her default in a reasonable and responsible manner.

[35] If the credit provider complies with the requirements set out in [31] to [33] above and receives no response from the consumer within the period designated by the Act, I fail to see what more can be expected of it. Certainly, the Act imposes no further hurdles and the credit provider is entitled to enforce its rights under the credit agreement. It deserves re-emphasis that the purpose of the Act is not only to protect consumers, but also to create a "harmonised system of debt restructuring, enforcement and judgment, *which places priority on the eventual satisfaction of all responsible*

[48] Id at para 77.

consumer obligations under credit agreements."[49] Indeed, if the consumer has unreasonably failed to respond to the section 129 notice, she will have eschewed reliance on the consensual dispute resolution mechanisms provided for by the Act. She will not subsequently be entitled to disrupt enforcement proceedings by claiming that the credit provider has failed to discharge its statutory notice obligations.

[36] As set out earlier, even if the section 129 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 nevertheless not have come to the attention of a reasonable consumer.[50] But if the credit provider has complied with the requirements set out above, it will be up to the consumer to show that the notice did not come to her attention and the reasons why it did not.

[37] During the hearing counsel for Mr Kubyana asserted that the notion of "the obligations of a reasonable consumer" has no basis in the Act. This simply is not so. Its roots lie in section 3, which emphasises the importance of "responsible borrowing", the "fulfilment of financial obligations by consumers", "discouraging . . . contractual default by consumers" and the "satisfaction of all responsible consumer obligations". It also draws from, among other things, the notice provisions of the Act. In empowering a consumer to decide on the manner in which she receives notices, sections 65(2) and 96 impose a corollary obligation on her to do what is necessary in order to take receipt of those notices in accordance with the manner of delivery she

[49] Section 3(i) of the Act. (Emphasis added.)

[50] See *Sebola* above n 11 at para 77.

has chosen. Put simply, if the consumer has elected to receive notices by way of registered mail, she must respond to notifications from the Post Office requesting her to collect registered items unless, in the circumstances, a reasonable person would not have responded.

[38] One of the main aims of the Act is to enable previously marginalised people to enter the credit market and access much needed credit. Credit is an invaluable tool in our economy. It must, however, be used wisely, ethically and responsibly. Just as these obligations of ethical and responsible behaviour apply to providers of credit, so too to consumers. It is so that a credit provider will only have discharged its obligation to effect delivery if the delivery would have resulted in the section 129 notice being drawn to the attention of a reasonable consumer. However, it is also the case that a consumer will not be entitled to rely on a credit provider's alleged non-compliance with section 129 if she has been unreasonably remiss in failing to engage with the notice. The notion of a "reasonable consumer" implies obligations for both credit providers and consumers.

Conclusion: the obligation to deliver

[39] 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 to make the section 129 notice

available to the consumer by having it delivered to a designated address.[51] When the consumer has elected to receive notices by way of the postal service, the credit provider's obligation to deliver generally consists of dispatching the notice by registered mail,[52] ensuring that the notice reaches the correct branch of the Post Office for collection[53] and ensuring that the Post Office notifies the consumer (at her designated address) that a registered item is awaiting her collection.[54] This is subject to the narrow qualification that, if these steps would not have drawn a reasonable consumer's attention to the section 129 notice, 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.

[40] The interpretation of "delivery" set out in the preceding paragraph is consonant with the statutory objectives of consumer protection and consensual dispute resolution in that it imposes obligations on the credit provider to ensure that the consumer is adequately informed of her statutory rights to seek extra-curial assistance. It also reflects an appropriate balancing of interests: while the obligation to deliver the section 129 notice rests on the credit provider, if the consumer acts unreasonably the credit provider may go ahead and seek enforcement of the credit agreement notwithstanding the consumer's failure to engage with the contents of the notice.

[51] Sections 65(2) and 96(1) of the Act.

[52] Id section 168(b).

[53] *Sebola* above n 11 at paras 75 and 77.

[54] Id.

Sebola revisited: proof of delivery

[41] I now move on to consider what a credit provider must prove in order to satisfy a court that it has discharged its obligation to effect delivery of a section 129 notice to a consumer. It is appropriate to begin with a discussion of this Court's judgment in *Sebola*.

[42] *Sebola* concerned an application for the rescission of a default judgment. Mr and Mrs Sebola concluded a home loan agreement with Standard Bank. Approximately two years later they defaulted on their bond repayments. Although Standard Bank dispatched a section 129 notice, it was sent to the wrong branch of the Post Office. Standard Bank thereafter issued summons against the couple for payment of the full outstanding amount due under the mortgage bond. Subsequently, the Registrar of the High Court granted default judgment against Mr and Mrs Sebola. The Sebolas successfully appealed to this Court.[55]

[43] The majority judgment held:

(a) The Act does not require proof that the section 129 notice came to the subjective attention of the consumer.[56] Instead, the Act requires the credit provider to "make averments that will satisfy a court that the

[55] Id at paras 4-10.

[56] Id at para 74.

notice probably reached the consumer".[57] Indeed, the Act must not be interpreted so as to impose obligations that are "impossible to fulfil."[58]

(b) When a consumer has elected to receive notifications through the postal service, the credit provider must show that—

(i) the section 129 notice was sent by registered mail and delivered to the correct branch of the Post Office, generally to be deduced from a track and trace report;

(ii) the Post Office informed the consumer that a registered item was available for collection;

(iii) the notification from the Post Office reached the consumer, which may generally be inferred if the notification was sent to the correct postal address (as designated by the consumer), unless there is an indication to the contrary; and

(iv) a reasonable consumer would have ensured retrieval of the registered item from the Post Office.[59]

These principles are consistent with what has been set out above regarding the nature of a credit provider's obligation to deliver.

[44] However, the majority judgment in *Sebola* contains broad language which could be misconstrued. Paragraph 79 of that judgment reads:

[57] Id at para 75.

[58] Id at para 57.

[59] Id at paras 77 and 87.

> "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)."

And at paragraph 87:

> "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. If it finds that the credit provider has not complied with section 129(1), it must in terms of section 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed."

[45] *Sebola* was not concerned with contested enforcement proceedings during which judgment was granted against consumers – it related to the Sebolas' attempt to procure rescission of a default judgment. Neither was there any suggestion of a failure by, or culpability on the part of, Mr and Mrs Sebola. The judgment was therefore not concerned with a situation where the notice had been validly delivered by the credit provider, but then remained uncollected, or unattended to, by the consumers. The statements quoted above were unnecessarily broad. To the extent that the judgment implies that a credit provider will not have discharged its obligation to effect delivery because a consumer unreasonably fails to collect or attend to a properly dispatched section 129 notice, it misstated the law. This is apparent from the excursus of the Act set out above, that (a) a credit provider is under no obligation to bring a section 129 notice to the subjective attention of a consumer and (b) a consumer must respond reasonably when a credit provider has properly sought to

bring such a notice to her attention. In a similar vein, and in addition to acknowledging the importance of a consumer's obligation to act reasonably,[60] the majority judgment stated the following:

> "[T]he 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."[61]

[46] The Act does not imply, and cannot be interpreted to mean, that a consumer may unreasonably ignore the consequences of her election to receive notices by registered mail, when the notifications in question have been sent to the address which she duly nominated. While it is so that consumers should receive the full benefit of the protections afforded by the Act, the noble pursuits of that statute should not be open to abuse by individuals who seek to exercise those protections unreasonably or in bad faith.

[47] Similarly to paragraphs 79 and 87 of *Sebola*, paragraph 74 indicates that there is an obligation on the credit provider to prove that the section 129 notice "in fact reached the consumer". This statement must be understood in the light of *Sebola*'s attempt to prescribe a method of fact determination for courts faced with applications for default judgment and to indicate which factual inferences may be drawn in a situation where factual sources are few. However, as shown, any notion that the Act

[60] Id at para 77.

[61] Id at para 74.

requires a credit provider to ensure that, as a matter of fact, the section 129 notice definitely reached the consumer is misconceived.

[48] It is so that section 96(1) requires that notices be delivered "at the address" provided by the recipient. However, this requirement must be understood with due regard to the practical aspects of dispatching a notice by way of registered mail. When a credit provider dispatches a notice in that manner, the notice is sent to a particular branch of the Post Office. That branch then sends a notification to the consumer, indicating that a registered item is available for collection. It is never the case that an item dispatched by registered mail will physically be delivered to an individual – such delivery only occurs if the item is sent by ordinary mail, which does not suffice for purposes of sections 129 and 130 of the Act.[62] If a consumer elects not to respond to the notification from the Post Office, despite the fact that she is able to do so, it does not lie in her mouth to claim that the credit provider has failed to discharge its statutory obligation to effect delivery.

Clarification of the phrase "contrary indication"

[49] A final aspect of *Sebola* requires clarification. Much was made by counsel of the notion of a "contrary indication":

> "The credit provider's summons or particulars of claim should allege that the [section 129] notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection.

[62] Id at para 68.

> Coupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed *in the absence of contrary indication*, and the credit provider may credibly aver, that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office."[63] (Emphasis added).

[50] Mr Kubyana avers that as soon as there is a "contrary indication" showing, as a matter of fact, that the section 129 notice did not come to the subjective attention of the consumer, that suffices to show that the requirements of section 129 have not been met. Moreover, he contends that when a section 129 notice is returned to the credit provider uncollected, notwithstanding the fact that it was sent to the correct branch of the Post Office and the fact that the Post Office sent a notification to the consumer's address that a registered item was awaiting collection, such a return constitutes a "contrary indication".

[51] This argument cannot be sustained. It is premised on the notion that a credit provider is under an obligation to bring a section 129 notice to the subjective attention of the consumer, which is not the case. It fails to appreciate that, if the purpose of consensual dispute resolution is to be achieved, a consumer must act responsibly when notified of her default – the credit provider does not bear sole responsibility for ensuring that the objective underlying section 129 is achieved. And it does not account for the responsibilities of a reasonable consumer: the Act does not allow a consumer to ignore, or unreasonably fail to respond to, notifications from the Post Office and thereby stave off enforcement proceedings by a credit provider.

[63] Id at para 77. See also para 87.

[52] Mr Kubyana's argument is also based on a misreading of *Sebola*. The "contrary indication" requirement applies to two inferences that a court may make: the inference that the notification from the Post Office (indicating that a registered item is available for collection) reached the consumer and the inference that a reasonable consumer would have responded to that notification and retrieved the notice. The first inference is based on the reasonable assumption that when a credit provider has dispatched a notice by means of registered post, has specified the correct address for the consumer and has ensured that the notice is delivered to the correct branch of the Post Office, the notification calling on the consumer to collect a registered item will be delivered to her address. 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 a registered 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 to her address.

[53] Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect

delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour.

Conclusion: proof of delivery of a section 129 notice

[54] The Act prescribes obligations that credit providers must discharge in order to bring section 129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that—

(a) the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;

(b) the Post Office issued a notification to the consumer that a registered item was available for her collection;

(c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and

(d) a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a)-(c), which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.

Did Standard Bank comply with section 129 of the Act?

[55] We are presently concerned with contested proceedings where the dispute was fully ventilated at trial. All the relevant information on which the parties elected to rely was placed before the High Court. From that information it is apparent that Standard Bank sent the section 129 notice via registered mail to the branch of the Post Office nominated by Mr Kubyana, and the Post Office sent two notifications to Mr Kubyana's designated address indicating that a registered item was awaiting his collection. There was and remains no denial that he received the notifications. In the absence of any explanation from him, we may therefore reasonably assume that the notifications from the Post Office reached his attention. Mr Kubyana's case is only that he did not collect the section 129 notice. He did not give evidence at trial to substantiate this assertion.

[56] It is sufficient to bring the section 129 notice to a consumer's attention for that consumer to have agreed to receive the notice by way of registered mail and then to receive a notification that a registered item is awaiting her attention. This is the case unless a reasonable consumer would not, in the circumstances, have taken receipt of the notice.

[57] But this defence cannot avail Mr Kubyana, for he elected neither to testify nor to provide an explanation for why he did not respond to the notifications from the Post Office. That being the case, there is no basis upon which we can determine that, notwithstanding Standard Bank's efforts, it was reasonable for Mr Kubyana not to have taken receipt of the section 129 notice. And it must be remembered that the defence is a narrow one: it would apply only if Mr Kubyana were able to prove that, despite the credit provider's attempts at delivery, a reasonable consumer in his position would not have collected the notice or responded to it. In the result, Standard Bank did all that was required of it by the Act. To hold it to a higher standard would be to impose an excessively onerous standard of performance.

[58] Standard Bank has thus complied with the requirements contained in section 129 of the Act. It was entitled to commence legal proceedings and to enforce its claims under the instalment sale agreement when it did. There is therefore no basis to interfere with the order of the High Court.

The access to information argument

[59] This argument, too, must fail. Even if we accept that section 32 of the Constitution is of application in this case, for the reasons set out above there is nothing before us to indicate that Standard Bank did not do what was required by law in order to provide Mr Kubyana with information regarding his default and his statutory rights. The appeal therefore fails.

Costs

[60] At the hearing counsel for Standard Bank, when pressed by the Bench, agreed to leave the question of costs in the hands of the Court. Mr Kubyana has not been successful in this Court. I am also mindful of the fact that at least some of the grounds on which he sought to appeal the High Court's decision were spurious.[64] That being said, this judgment represents a clarification of the law which is important not only to consumers but also to providers of credit, including Standard Bank. I therefore consider it just and equitable to make no order as to costs.

Order

[61] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

[64] I have in mind the allegation that his trial was unfair, which, from the record, appears to be wholly unfounded and completely opportunistic.

JAFTA J (Moseneke ACJ, Cameron J, Dambuza AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J concurring):

[62] I have read the judgment prepared by my Colleague Mhlantla AJ (main judgment). While I agree with much of what it says and the order proposed, I have decided to write separately on the interpretation of section 129(1) of the Act and provide further clarification on the judgment of this Court in *Sebola*.[65]

[63] It has become necessary for this Court to clarify its judgment in *Sebola* due to the confusion that has ensued as a result of conflicting interpretations of the *Sebola* judgment by various courts.[66] In *Binneman*, the Western Cape High Court held that *Sebola* has not changed the legal position proclaimed by the Supreme Court of Appeal in *Rossouw.*[67] In that case the Supreme Court of Appeal had held that the delivery requirement envisaged in section 129(1) would be satisfied if the credit provider dispatched the notice by registered mail to the consumer.[68]

[64] But the KwaZulu-Natal High Court in *Mkhize* came to the opposite conclusion.[69] The Court held that *Sebola* had overruled *Rossouw* in that it considered

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[65] *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (*Sebola*).

[66] *Nedbank Ltd v Binneman and Thirteen Similar Cases* [2012] ZAWCHC 121; 2012 (5) SA 569 (WCC); *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* [2012] ZAKZDHC 38; 2012 (5) SA 574 (KZD) (*Mkhize*); and *Balkind v ABSA Bank, In re ABSA Bank Ltd v Ilifu Trading 172 CC and Others* [2012] ZAECGHC 102; 2013 (2) SA 486 (ECG).

[67] *Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans (Formerly First Rand Bank of South Africa Ltd)* [2010] ZASCA 130; 2010 (6) SA 439 (SCA) (*Rossouw*).

[68] Id at para 32.

[69] *Mkhize* above n 66 at para 50.

the dispatch of the notice by registered mail to be insufficient proof of delivery. Instead, *Sebola* required that a further step, namely, that the registered mail reached the correct local Post Office of the consumer, be established.

[65] In *Balkind*, the Eastern Cape High Court agreed that *Sebola* altered the position stated in *Rossouw*. In *Balkind* the High Court said:

> "Effectively, *Sebola* held that dispatch of the notice by registered post is not enough; more is required. It concluded that proof by means of the post office 'track and trace' report that the registered post reached the correct post office, would constitute proper delivery of the notice to the consumer as contemplated by section 129."[70]

[66] Before determining which of the interpretations given to *Sebola* is correct, I must consider the relevant provisions. Section 129(1) provides:

> "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), or in section 86(10), as the case may be; and
>
> (ii) meeting any further requirements set out in section 130."

[70] *Balkind* above n 66 at para 12.

[67] The text of this section reveals that in the event of the consumer being in default of her repayments of the loan, the credit provider is obliged to draw the default to the attention of the consumer. The section prescribes that the notice given to the consumer must be in writing. It further stipulates what the notice must contain. The notice must propose the options available to the consumer who is in financial distress and unable to purge the default. It must point out that, at the election of the consumer, the credit agreement may be referred to a debt counsellor, dispute resolution agent, consumer court or ombud. The purpose of the referral must also be stated in the notice.

[68] The purpose of the referral is to resolve whatever disputes may have arisen from the credit agreement and also to agree on a plan to cure the default and bring the payments up to date. Furthermore, the section makes reference to section 130 which governs the institution of litigation for enforcing credit agreements. Section 129(1) lays down two conditions which must be met before the credit provider may institute litigation. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before—

(a) first providing notice to the consumer; and

(b) meeting further requirements set out in section 130.

[69] The reference to section 130 divulges a strong link between the two sections, hence they are required to be read together for a proper understanding of their scheme. As I see it, the application of these sections is triggered by the consumer's failure to

repay the loan. These sections suspend the credit provider's rights under the credit agreement until certain steps have been taken.

[70] The credit provider is not entitled immediately to exercise its rights under the agreement. It is first required to notify the consumer of the default and demand that the arrears be paid. If the consumer pays up the arrears, then the dispute is settled. But it may so happen that the default is occasioned by the consumer's financial difficulties. In that event, instead of enforcing the agreement, the credit provider must afford the consumer an opportunity to refer the agreement to one of the bodies listed in section 129(1)(a).

[71] The opportunity for referral is a prelude to litigation. If the consumer makes use of this opportunity, the dispute relating to the default and the credit agreement are submitted to a debt counsellor, if the consumer so chooses. The debt counsellor helps the parties to reach agreement on how the loan would be repaid and the arrears cleared. This may be achieved by re-arranging the terms of the credit agreement. If this happens, the credit provider loses the right to enforce the original credit agreement arising from the consumer's default.

[72] However, in many cases, as is the position here, consumers do not take up the opportunity to refer the dispute. Once that happens, the credit provider becomes free to enforce the credit agreement in the ordinary courts. But the credit provider's

enforcement of the agreement is subject to conditions stipulated in sections 129 and 130. Section 130(1) provides:

> "Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and—
>
> (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), 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."

[73] It is apparent from the language of section 130(1) that a credit agreement to which the Act applies may be enforced only if the requirements laid down in that section are met. This is irrespective of any stipulation to the contrary in the agreement itself or another law.[71] When a credit provider seeks to enforce the agreement by means of litigation, it must first show compliance with section 130, which, by extension, refers back to section 129.

[74] The first requirement is that the consumer has been in default for at least 20 business days. Furthermore, a minimum of 10 business days from the date of delivery of the notice to the consumer must have lapsed. And the consumer must have

[71] Section 130(3), the text of which is quoted in [84] below.

failed to respond to the notice within the period of 10 business days or responded by rejecting the credit provider's proposals. In the case of a lease, secured loan or an instalment agreement, the additional requirement is that the consumer must have failed to surrender the relevant property to the credit provider.

[75] Delivery of the notice is one of the requirements of section 130. The date on which the delivery has occurred is crucial to the calculation of the 10 business days within which the consumer is expected to respond. In this regard, therefore, the meaning of the words "delivered a notice to the consumer" is critical to the application of the section. The Act does not define the word "delivered". Consequently, it must be given its ordinary meaning.

[76] The Concise Oxford English Dictionary states that "deliver" means "bring and hand over (a letter or goods); provide something (promised or expected); launch or aim (a blow or attack); state or present in a formal manner; assist in the birth of; and save or set free". Of the various meanings, it seems to me that only the first one is relevant to the context in which the word is used in section 130.

[77] It is a fundamental principle of interpretation that words used in a statute or written document must be construed in their proper context.[72] In *Bato Star* this Court

[72] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*).

held that "the technique of paying attention to context in statutory construction is now required by the Constitution."[73] The Court said:

> "It is no doubt true that it is a primary rule of statutory construction that words in a statute must be given their ordinary grammatical meaning. But it is also a well-known rule of construction that words in a statute should be construed in the light of their context."[74]

[78] The process of interpretation, I emphasise, does not involve a consideration of facts. Matters of evidence do not come into the equation. This is so because statutory construction is an objective process, with no link to any set of facts but in terms of which words used in a statute are given a general meaning that applies to all cases, falling within the ambit of the statute.[75]

[79] The word "deliver" is commonly used in our law, particularly in the field of contracts and service of court process. In its common sense, deliver means bringing or taking something to a recipient. For example, if a contract of sale requires the seller to deliver a motor vehicle to the purchaser, it is construed to mean that the seller has to take the vehicle to the purchaser. For delivery to take place, it does not follow that the vehicle must have been handed over to the purchaser in person.[76] Depending on the circumstances of the case, taking the vehicle to the purchaser's address may

[73] Id at para 91.

[74] Id at para 89.

[75] *CA Focus CC v Village Freezer t/a Ashmel Spar* [2013] ZASCA 136; 2013 (6) SA 549 (SCA) at para 18 and *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

[76] However, what is said about delivery here is limited to matters where sections 129 and 130 of the Act apply. It does not change or affect the methods of delivery known in the common law.

constitute delivery. But the actual taking of the vehicle would constitute factual proof of what was done. And this is a matter of evidence and not interpretation.

[80] It seems to me that in the context of section 130(1) read with section 129(1), delivered means taking a notice to the consumer. As long as steps taken show on a balance of probabilities that the notice is likely to have reached the consumer, the court before which the proceedings are brought may be satisfied that the notice was delivered.

[81] In delivering the notice, the credit provider may follow any method. This is so because sections 130(1) and 129(1) do not specify a particular method of delivery. All that they require is that the notice be delivered. If a particular method is chosen, whatever is done must constitute adequate proof that the notice has reached the consumer. If, for example, the credit provider has chosen to send the notice by ordinary post, proof of the letter reaching the consumer's address would ordinarily constitute delivery contemplated in the relevant sections. These facts would give rise to the presumption that the notice reached the consumer. This type of presumption is recognised in our law.[77]

[82] But if, in defending the action instituted by the credit provider, the consumer establishes that at the relevant time she was lying unconscious in hospital, the credit provider would have failed to prove delivery and therefore the court would not be

[77] *Phillips v South African Reserve Bank and Others* [2012] ZASCA 38; 2013 (6) SA 450 (SCA) at para 48.

satisfied that the notice reached the consumer. Absent an explanation of that nature, the court may be satisfied, on a balance of probabilities, that the notice reached the consumer. But, as mentioned earlier, the enquiry here would be directed at establishing proof of delivery and not the meaning of the word.

[83] In the case of registered mail, the delivery of the notice to the consumer's local Post Office, coupled with sending notification to her address, may in appropriate cases be regarded as constituting compliance with the delivery requirement. A consumer who receives notification from the local Post Office but decides not to collect the notice should not be permitted to frustrate the purpose of the provisions while, at the same time, the credit provider is precluded from enforcing its rights under the contract. In such a case, a court may as well hold that there was a fictional fulfilment of the requirement. Our courts are familiar with this concept which applies where, for example, a party to a contract deliberately frustrates the fulfilment of a condition, so that the other party cannot enforce its rights.[78]

[84] It is apparent from section 130(3) that it is the court before which the proceedings are instituted which must be satisfied that, among other matters, the notice has reached the consumer. Section 130(3) provides:

> "Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that—

[78] *Balkind* above n 66 at para 48 and *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] ZASCA 52; 2007 (5) SA 552 (SCA) at para 16.

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with".

[85] If the court is not satisfied that the section 129 notice was delivered to the consumer, it is obliged to adjourn the proceedings and specify steps to be taken by the credit provider before resuming the hearing of the matter.[79] This illustrates that enforcement of the credit agreement through litigation is suspended for as long as the credit provider has not complied with the requirements of the relevant sections.

Present facts

[86] The facts are set out in detail in the main judgment. On 16 July 2010 Standard Bank sent a section 129 notice by registered mail to Mr Kubyana. The notice reached his local Post Office which, in turn, sent out a notification to the address nominated by him as his domicilium. The first notification was sent to his address on 20 July 2010 but he failed to collect the registered mail. Seven days later, a second notification was dispatched to his address. Again he failed to collect the mail. On 1 September 2010 the notice was returned to the Bank.

[87] Mr Kubyana did not contest the correctness of these facts by way of evidence in the High Court. That Court approached the matter on the footing that Mr Kubyana received notification of the registered mail but failed to collect it. The Court held that there was compliance with the relevant provisions.

[79] See section 130(4) quoted in the main judgment at [25].

[88] Mr Kubyana's failure to testify and explain why he did not collect the notice drives one to the inescapable conclusion that he deliberately failed to collect it. He cannot be allowed to frustrate the objects of the Act. The relevant provisions were enacted to protect honest consumers who, for some reason, find themselves in dire financial straits. As indicated earlier, the object of the relevant provisions 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.

[89] A balance must be struck between the rights of the consumer and those of the credit provider when applying sections 129 and 130. The offer of credit is crucial to the economy of this country. Without it the majority of people would not afford to buy houses and other assets necessary to human life. Therefore, the collapse of the system would be detrimental to the country's economy and the majority of its people.

[90] In these circumstances, I agree that the appeal must fail.

The judgment in Sebola

[91] As mentioned, conflicting interpretations have been given to the judgment of this Court in *Sebola*. As a result, uncertainty has been created as to what section 129 means and what it requires credit providers to do to comply, if they wish to enforce credit agreements by legal proceedings. As observed in the main judgment, this case presents an opportunity for this Court to clarify its judgment in *Sebola*. In doing so it

is necessary to draw a distinction between interpretation, on the one hand, and evidential material to prove compliance with the section, on the other.

The meaning of section 129 as construed in Sebola

[92] This Court in *Sebola* read section 129(1) together with section 130(1). In section 130 the word "delivered" is used and this section refers back to section 129 which employs the words "providing notice to the consumer". While section 130 requires that a notice must be delivered to the consumer, section 129 stipulates that the consumer be provided with a notice. The common object of these sections is to prevent the commencement of legal proceedings before the steps defined in section 129 have been taken.

[93] It was in this context that this Court construed section 129 to mean that the credit provider must furnish the consumer with a notice. A perusal of a number of paragraphs suggests that *Sebola* interpreted section 129 to mean that the notice should reach the consumer and not that it actually came to her attention. A reference to two paragraphs illustrates this point.

[94] In one paragraph, the majority said:

> "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."[80] (Emphasis added.)

[95] And later the majority summed up its interpretation in these terms:

> "To sum up: 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 posts 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. 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. If it finds that the credit provider has not complied with section 129(1), it must in terms of section 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed."[81] (Emphasis added.)

[96] As shown earlier, the dispatching of a notice by registered mail, and showing that it has reached the correct Post Office, are facts which do not form part of the interpretation. As facts, ordinarily they are peculiar to certain cases and not universal to all cases in which the Act finds application. But the interpretation is universal. The section carries the same meaning in all cases.

[80] *Sebola* above n 65 at para 74.

[81] Id at para 87.

[97] Therefore, the ratio of *Sebola*, as I see it, is that the words "providing notice to the consumer" are synonymous with the phrase "delivered a notice to the consumer", which appears in section 130. Both of them mean that the notice must be taken to the consumer. It must reach the consumer but this does not mean that the notice must actually be viewed by the consumer.

Proof of delivery

[98] The determination of the facts that would constitute adequate proof of delivery of a notice in a particular case must be left to the court before which the proceedings are launched. It is that court which must be satisfied that section 129 has been followed. Therefore, it is not prudent to lay down a general principle save to state that a credit provider must place before the court facts which show that the notice, on a balance of probabilities, has reached a consumer. This is what *Sebola* must be understood to state. It follows that the interpretation of *Sebola* in *Binneman* was incorrect.

[99] While it is true that in the quoted paragraphs the majority went to the extent of saying that, where delivery is by registered mail, proof of the fact that the notice reached the correct Post Office would constitute compliance, that is not part of the ratio. The facts in *Sebola* were different in that the notice was sent to the wrong Post Office. Consequently, it was not necessary for this Court to determine whether in circumstances where the notice has reached the correct Post Office, nothing more needs be proved to show that, on a balance of probabilities, the notice has reached the

consumer. The view expressed there was obiter. What is binding in *Sebola* is the interpretation given to section 129. That interpretation is endorsed in this judgment.

[100] It is for these reasons that I concur in the order proposed by the main judgment.

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