CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 98/11
[2012] ZACC 11

In the matter between:

MASHILO SHADRACK SEBOLA	First Applicant
NOMBEKO DAPHNE SEBOLA	Second Applicant
and	
STANDARD BANK OF SOUTH AFRICA LIMITED	First Respondent
DEPUTY SHERIFF OF THE HIGH COURT, ROODEPOORT: FWJ COETZEE	Second Respondent
and	
SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA	First Amicus Curiae
NATIONAL CREDIT REGULATOR	Second Amicus Curiae
BANKING ASSOCIATION SOUTH AFRICA	Third Amicus Curiae

Heard on : 14 February 2012

Decided on : 7 June 2012

JUDGMENT

CAMERON J (Yacoob ADCJ, Froneman J, Khampepe J, Maya AJ, Nkabinde J, Skweyiya J and van der Westhuizen J concurring):

Introduction

[1] This is an application for leave to appeal directly to this Court against a judgment of the Full Court of the South Gauteng High Court. That Court dismissed an appeal against a decision of a single judge of the same court (High Court), which refused to rescind a default judgment entered against the applicants, Mr and Mrs Sebola, in September 2009. Standard Bank (Bank) obtained the judgment after it instituted action to reclaim a home loan Mr and Mrs Sebola owed.

[2] The main issue before both the High Court and the Full Court was whether the provisions of the National Credit Act[1] (NCA) that entitle a debtor to written notice before a credit provider may institute action[2] require that the debtor actually receive that notice. It was accepted that the Sebolas did not receive the notice the Bank sent to them. The High Court and the Full Court, the latter relying on the decision of the Supreme Court of Appeal in *Rossouw*,[3] held that proof by the Bank that it had despatched the notice was sufficient, even if the notice did not reach the debtor, and therefore that the action against

[1] Act 34 of 2005.

[2] Section 129(1) read with section 130. These provisions are set out in [43]-[44] below.

[3] *Rossouw and Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) (*Rossouw*). There were two judgments, one by Maya JA, and a concurring judgment by Cloete JA. Cloete JA concurred in the judgment of Maya JA, who concurred in his, and the other members of the Court (Mpati P, Navsa JA and Ebrahim AJA) concurred in both.

the Sebolas was competent. The effect of these judgments was that the sale in execution of the Sebolas' property could go ahead.

[3] In their application to this Court, Mr and Mrs Sebola put that interpretation in issue. They say it fails to give effect to sections 8(3)[4] and 39(2)[5] of the Constitution. But after they lodged the application, the Bank abandoned the judgment it obtained against them. It now says the matter has become moot. That question, as well as condonation, must be considered before it is possible to consider whether the substantive issues of interpretation should be addressed. But first, a fuller background.

Background

[4] Mr and Mrs Sebola, married in community of property, entered into a home loan agreement with the Bank in November 2007, under which the Bank granted them a loan of R1 312 500 against security of a mortgage bond over their home. Clause 13 of the agreement, "Jurisdiction and addresses", recorded that the Sebolas chose the mortgaged property as the address where notices and documents "in any legal proceedings" should

[4] Section 8(3) provides:

> "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)."

[5] Section 39(2) provides:

> "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."

be served. In addition, they specified a post office box in North Riding, Johannesburg, as the postal address to which "letters, statements and notices may be delivered". The clause recorded that the Sebolas accepted "that any letters and notices posted to this address by the Bank by registered post will be regarded as having been received within 14 (fourteen) days after posting".

[5] By 2009 the Sebolas had fallen into arrears with their bond repayments. On 16 March 2009 the Bank's then attorneys sent a notice to them, addressed to their North Riding post office box. The notice identified itself in terms of sections 129 and 130 and set out the options available to the Sebolas under that provision. It was sent by registered mail. In their rescission application, the applicants testified that they never received it. This was because the postal services diverted the notice to the wrong post office. The Sebolas attached to their papers a post office "tracking and tracing" record, which appeared to show that the item intended for North Riding had been diverted instead to the Halfway House post office.

[6] On 25 May 2009 the Bank issued summons against Mr and Mrs Sebola in the South Gauteng High Court in which it sought payment of the full outstanding amount under the mortgage bond, namely R1 156 092.30, together with interest and costs. The Bank also sought an order declaring the property "specifically" executable. The return of service indicated that the summons was served on 27 May 2009 by affixing a copy to the

principal door of the property at the applicants' chosen domicilium, being the mortgaged property.

[7] On 25 September 2009, the Registrar of the South Gauteng High Court granted default judgment against the Sebolas, affording the Bank all the relief it sought. On 17 November 2009, the Bank obtained a writ of attachment in respect of the property. It was only after this, the Sebolas testified, that they became aware of the judgment for the first time. They later sought to rescind the judgment, and the writ of execution the Bank obtained against their home pursuant to it.

[8] In their rescission application, the Sebolas stated that they did not receive the summons, and asserted that it was impossible that the summons could have been affixed to their door since their home is in a housing development, and they had ascertained that the Sheriff did not gain entry on the day the return of service indicated.

High Court decision

[9] In their application for rescission, the Sebolas conceded that their repayments were in arrears and that they were consequently in breach of the bond agreement. But they stated that they had received neither the summons nor the section 129 notice before the Bank initiated proceedings. Hence the Bank's action was incompetent.

[10] For the purposes of rescission, the Bank accepted that the Sebolas were unaware of the summons. So the only question was whether, if the judgment was rescinded, the Sebolas would have a defence to the Bank's action. That depended on whether the Bank had complied with sections 129(1) and 130(1) before instituting action. At the time of the hearing there were conflicting single-judge decisions about the provisions,[6] but no Supreme Court of Appeal decision. Blieden J followed earlier decisions that held that a credit provider's proof of postage to the correct (chosen) address constituted compliance for the purposes of the provisions. He thus rejected the applicants' argument that non-receipt of the section 129(1) notice constituted a bona fide defence to the Bank's claim. He dismissed the application for rescission with costs.

[11] He immediately granted the Sebolas leave to appeal against his decision to the Full Court.

Full Court appeal

[12] The Sebolas appealed to the Full Court. Just over 10 weeks after they filed their notice of appeal, and before the appeal was heard, the Supreme Court of Appeal handed down its decision in *Rossouw*.

[6] *Standard Bank of South Africa Ltd v Rockhill and Another* 2010 (5) SA 252 (GSJ) (provision does not require proof of receipt, but only despatch to postal address selected by consumer); *Firstrand Bank Ltd v Dhlamini* 2010 (4) SA 531 (GNP) (more than mere despatch required: proper notice involving personal service drawing the notice to the consumer's actual attention is necessary); *Starita v ABSA Bank Ltd and Another* 2010 (3) SA 443 (GSJ) (provision does not require proof of receipt of notice by consumer, but only despatch to exact address chosen by consumer); *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD) (delivery is effected by despatch, hence mere proof of posting by registered post is sufficient); *Standard Bank of South Africa Ltd v Mellet and Another* [2009] ZAFSHC 110 (actual receipt not required); *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D&CLD) (more required than mere despatch).

[13] In *Rossouw*, a bank sought summary judgment against a couple who had defaulted on their mortgage bond repayments. In their bond agreement, the couple chose delivery by registered post at the mortgaged property as a means of service of any notice. Their defences to the Bank's summary judgment application included that they had not received the statutory notice. Resolving the conflict between High Court judgments,[7] the Supreme Court of Appeal found that section 129 did not require the credit provider to prove that the consumer had received the notice – proof of despatch to the consumer's chosen address was sufficient:

> "It appears to me that the legislature's grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer's shoulders. With every choice lies a responsibility, and it is after all within a consumer's sole knowledge as to which means of communication will reasonably ensure delivery to him. It is entirely fair in the circumstances to conclude from the legislature's express language in s 65(2) that it considered despatch of a notice in the manner chosen by the appellants in this matter sufficient for purposes of s 129(1)(a), and that actual receipt is the consumer's responsibility."[8]

[14] Before the Full Court, the Sebolas sought to undercut *Rossouw* with constitutional arguments on interpretation. But the Court held itself bound by *Rossouw*. It found that the decision had authoritatively decided that the credit provider's mere sending of the

[7] See above n 6.

[8] *Rossouw* above n 3 at para 32, per Maya JA. The Court held that the bank had failed to prove in its application for summary judgment that the registered letter had actually been sent to the Rossouws, and therefore that summary judgment should have been refused. The appeal succeeded on this ground.

notice by registered post to the address chosen in the mortgage bond constitutes compliance with the Act. The appeal was dismissed with costs.

Condonation

[15] The Full Court dismissed the Sebolas' appeal on 11 August 2011. The Rules of this Court[9] required them to apply for leave to appeal within 15 court days, by 1 September 2011. Instead, they filed their papers only on 12 October 2011 – about six weeks, or 29 court days, late. They seek condonation because they are representing themselves and needed to have the record transcribed to get legal advice about appealing. They state that they received the record from the transcribers only on 4 October 2011, hence the delay.

[16] The Bank does not dispute these facts, which favour condonation. The delay is not excessive, the prejudice and inconvenience minimal, and the Sebolas were at all times intent on pursuing their case. Condonation should therefore be granted.

Submissions in this Court

[17] The Sebolas submit that the High Court erred by failing to adopt a purposive and contextual reading of section 129. They submit section 129 should have been interpreted constitutionally in the light of the Act's objectives. The Full Court's interpretation, they

[9] Constitutional Court Rule 19(2).

say, renders the protections the statute affords consumers nugatory. They submit the decision in *Rossouw* adversely affects consumers who are not versed in law.

[18] The Bank submits that the matter has become moot. About three weeks before the date set for the hearing, it changed attorneys. Shortly before its written argument was due, the Bank informed the Sebolas, through its new attorneys, that its head office had reviewed the facts and decided to abandon the order and withdraw the action against them. The Bank recorded that it intends to grant the Sebolas the opportunity to exercise the protections afforded by section 129.

[19] Apart from mootness, the Bank submits that the Sebolas should not be allowed to appeal directly to this Court without first seeking a ruling from the Supreme Court of Appeal. It says the interests of justice are against a direct appeal because, although the way the Sebolas have framed their application does raise a constitutional issue, it was non-service of the summons that led to the default judgment against them, and not merely the fact that they did not receive the statutory notice. The Bank has now rectified the defect in the service of the summons by abandoning the judgment. Therefore the issues lack urgency.

[20] In addition, the Bank urged, the Supreme Court of Appeal has not had the opportunity to consider constitutional arguments on section 129. Hence this Court will decide that question as a court of first and last instance. The Bank urged that the

constitutional questions have not been properly pleaded or ventilated. Neither the Bank, nor other interested credit providers, have been afforded a proper opportunity to address the issues raised.

[21] The Bank moreover supported *Rossouw*. There is no reason, it contended, to think that the decision does not promote the spirit, purport and objects of the Bill of Rights. The statute, it submitted, seeks to achieve an equitable balance between the rights and responsibilities of consumers and credit providers. If anything, the applicants' interpretation would unjustifiably limit credit providers' right of access to courts.[10]

Amici curiae

[22] Three organisations were admitted as friends of the Court.

[23] The Socio-Economic Rights Institute of South Africa (SERI) is a non-profit company providing legal advice and representation on socio-economic rights. It is a registered law clinic, and also an approved law centre by the Johannesburg Bar Council. SERI lays emphasis on the wording of section 129(1)(a), which requires the credit provider to "draw the default to the notice of the consumer". This indicates, it contends, that the notice must come to the consumer's actual attention. However, a credit provider

[10] Section 34 of the Constitution provides:

> "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."

need not in every case prove conclusively that the consumer has received the notice. Rather, the Court should adopt the following standard: if it appears that (a) the credit provider has delivered the section 129 notice in compliance with the Act and the credit agreement, (b) the proceedings are not premature and (c) there is nothing to suggest otherwise, then a Court will normally be satisfied, on a balance of probabilities, that a consumer has in fact received the notice.

[24] This would not apply where the credit provider's papers are defective on their own terms, or a consumer attends court and asserts that the notice was not received. In these cases, the Court should adjourn the matter so that the consumer can be informed of, and consider exercising, the options the statute affords.

[25] The second amicus curiae is the National Credit Regulator (NCR), a body established under the Act to promote public awareness of consumer credit matters, and to provide guidance to the credit market and industry.[11] The NCR submits that section 129(1) should be interpreted so that its notice requirement is prima facie satisfied only when the credit grantor shows that it has taken the steps necessary to bring the notice to the attention of the consumer acting reasonably. Ordinarily, this will require the credit provider to satisfy the court that the section 129(1)(a) notice actually reached the address specified by the consumer.

[11] Sections 12 and 16 of the Act.

[26] The NCR emphasises the importance of actual receipt of the notice to the statutory scheme. It submits that the interpretation in *Rossouw* promotes neither the purpose of the NCA nor the constitutional rights of consumers, which section 129(1)(a) was enacted to protect. It considers that an important purpose of the Act was to promote non-litigious methods of resolving consumer defaults. The section 129(1)(a) notice is, it says, intended to bring extra-judicial remedies to the attention of consumers who are caught in debt default. Many of these consumers are members of previously disadvantaged or low-income communities and are unaware of the remedies available to them.

[27] The NCR commends its interpretation as practical. A court must be "satisfied" that the notice was received at the stipulated address. This requirement would be satisfied by appropriate averments made by the credit provider in the summons that the letter was sent by registered post on a specific date; delivered to the appropriate post office on a specific date (which can be shown using the post office's tracking technology); was not returned to the sender; and that the credit provider knows of no other circumstances to indicate that the consumer did not actually receive the notice.

[28] Where an opportunistic consumer deliberately declines to collect a registered letter, the NCR says that service can be effected by a sheriff. The NCR says these costs are relatively low. Once service has been proven, the onus will shift to the consumer to prove that the notice did not actually come to his or her attention, through no fault of his

or her own. Where the consumer does discharge this onus, the effect is only dilatory and gives the defendant an opportunity to exercise the rights set out in the section 129 notice.

[29] The third amicus is the Banking Association of South Africa (BASA), an association incorporated not for gain under the Companies Act,[12] and the official trade body of the banking industry. BASA submits that it is not in the interests of justice to decide the appeal as the evidence before the Court is inadequate. The Court, BASA says, lacks the facts needed to determine the true impact of the interpretations urged by SERI and the NCR on the banking industry. BASA has not been able to quantify the cost implications of those interpretations, but it speculates that it will run into the hundreds of millions of rands. This will have a ripple effect throughout the industry and economy, chasing up the cost of providing credit to all, thus harming poor consumers the most. It therefore urged the Court not to decide the matter.

[30] The interpretations SERI and the NCR advance are unsustainable, BASA submits, because they conflict with the language of the NCA, are not constitutionally required and would have dire consequences for the credit industry and the economy.

[31] And if the Court is inclined to adopt either SERI's or the NCR's interpretation, BASA submits the effect should be limited to cases involving the attachment and execution of consumers' homes. This will reduce the costs and the practical difficulties.

[12] Act 61 of 1973.

Mootness and leave to appeal

[32] The Bank correctly points out that any ruling this Court makes will not affect the Sebolas themselves. The judgment has been abandoned, together with the costs orders granted against them, and regardless of what this Court might decide about section 129, the options the provision affords will have been made available to them. Yet mootness is not an absolute bar to deciding an issue. That is axiomatic: the question is whether the interests of justice require that it be decided.[13] One consideration is whether the Court's order will have any practical effect on either the parties or others.[14]

[33] In this case, a range of considerations favour deciding the section 129 issue. Although the Bank has abandoned the judgment, the Sebolas have not withdrawn their application. Far from it: in written argument submitted the day before the hearing, they noted that the Bank still supports the reasoning of the Full Court judgment it has abandoned. They further note that the Bank has not tendered to pay the costs they incurred in resisting the sale of their home. Not only that, but they say the Bank has threatened to seek a costs order against them in this Court should they persist with their application. For them, the matter is far from moot.

[13] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as* Amicus Curiae*)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 29.

[14] Id.

[34] A dispute about costs alone is not normally enough reason to hear an appeal whose issues have otherwise gone dead.[15] But there is much more at stake here than the Sebolas' costs, significant as these no doubt are to them. The meaning this Court assigns to the statutory provisions will have significant practical impact.[16] There has been uncertainty for some years about their meaning, with conflicting first-instance decisions.[17] The Supreme Court of Appeal in *Rossouw* settled those disputes, but it did not have the benefit, as we have had, of argument specifically on the constitutional impact of the various interpretations. Nor did it have the benefit of the three amici. Their contrasting arguments greatly enriched the debate about the statute. Moreover, as the Sebolas' challenge demonstrates, the resolution *Rossouw* reached is controversial. That emerges too from the wide-ranging submissions made to us. It is desirable in the interests of certainty that this Court decide the appeal.

[35] This conclusion makes it unnecessary to consider the NCR's application to be granted direct access to this Court. One of the NCR's functions is to provide "guidance

[15] Section 21A(1) of the Supreme Court Act 59 of 1959 provides that the Supreme Court of Appeal may dismiss an appeal on the sole ground that "the judgment or order sought will have no practical effect or result". Section 21A(3) provides that, save in exceptional circumstances, "the question whether the judgment or order would have no practical effect or result" must be determined "without reference to consideration of costs". This Court in *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 11 held that the principle this provision embodies, that appeals solely on costs should be entertained only in "exceptional circumstances", was "manifestly meritorious." See also *Wiese v Government Employees Pension Fund and Others* [2012] ZACC 5 at para 22.

[16] See *MEC for Education, KwaZulu-Natal, and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at paras 32-5, where the Court decided the issues arising from a dispute between a school and a learner who had left the school by the time the matter was heard.

[17] See above n 6.

to the credit market and industry".[18] To do this, the Act empowers it to apply for a declaratory order on the "interpretation or application" of any provision.[19] In the alternative to its application to be admitted as an amicus, the NCR sought direct access to secure a definitive ruling. Since the substantive issues in the appeal will indeed be decided, this application has become unnecessary.

[36] As indicated, the Bank concedes that the applicants raise constitutional issues. These are whether the Supreme Court of Appeal in *Rossouw* gave enough weight to constitutional considerations in assigning a meaning to the statute's provisions. That these considerations are pertinent is clear, since the Preamble to the statute indicates that it was enacted to promote "a fair and non-discriminatory marketplace for access to consumer credit" and "black economic empowerment". The means by which the statute's purposes are to be achieved include "promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit"[20] and "promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers".[21] These goals, and the means by which they are to be pursued, are intimately connected to the Constitution's commitment to achieving equality.[22] Our jurisdiction is thus plain.

---

[18] Section 16(1)(b).

[19] Section 16(1)(b)(ii).

[20] Section 3(a).

[21] Section 3(d).

[22] Section 1 of the Constitution provides that one of its founding values is "the achievement of equality". Section 9(1) of the Bill of Rights provides that "[e]veryone is equal before the law and has the right to equal protection and

[37] In addition, though the Supreme Court of Appeal has not had the benefit of the wide range of arguments advanced before us, it has addressed the construction of the provisions in issue in *Rossouw*. Further, there has already been an appeal to the Full Court. There are moreover prospects of success. It is therefore in the interests of justice that the appeal be heard and its issues determined. Leave to appeal must be granted.

Sections 129 and 130 of the Act

[38] For more than twenty five years, the Usury Act[23] and the Credit Agreements Act[24] covered most[25] of the field of consumer credit regulation in South Africa.[26] But the financial credit market was ill-suited to South Africa's post-apartheid economy and society. It was—

> "characterised by discrimination, a lack of transparency, limited competition, high costs of credit, and limited consumer protection. The mechanisms to prevent over-indebtedness that were in place at the time, could also not adequately promote the rehabilitation of

benefit of the law." Section 9(2) provides that legislative and other measures, designed to protect or advance persons disadvantaged by unfair discrimination, may be taken to promote the achievement of equality. Section 39(2) provides that when interpreting any legislation, every court "must promote the spirit, purport and objects of the Bill of Rights."

[23] Act 73 of 1968.

[24] Act 75 of 1980. This Act replaced the Hire-Purchase Act 36 of 1942, which covered only a small number of credit transactions. See Otto and Otto *The National Credit Act Explained* 2 ed (LexisNexis, Durban 2010) at xi and para 2.

[25] Other statutes that cover consumer financial transactions include the Alienation of Land Act 68 of 1981, the Banks Act 94 of 1990 and the Consumer Protection Act 68 of 2008. Previously, the Lay-byes Regulations promulgated under the repealed Sale and Service Matters Act 25 of 1964 (formerly called the Price Control Act), governed lay-by agreements. See Joubert 5 *LAWSA* 2010 (second edition) at para 181. Lay-by agreements, where a supplier agrees to sell goods, and accepts payment in instalments, while holding the goods until the consumer has paid the full price, are now covered by section 62 of the Consumer Protection Act.

[26] See McQuoid-Mason (ed) *Consumer Law in South Africa* (Juta & Co. Ltd, Cape Town 1997) at 131-81.

> consumers, and the available debt relief could also not assist already over-indebted consumers to deal with their debt."[27]

[39] A major overhaul of previous credit legislation was essential. This was also necessary because low-income consumers relied increasingly on commercial credit and many were becoming swamped with debt. Reform came with the passage of the Act in 2005. It is weighty legislation, both in size and impact. It consists of 173 sections, together with three schedules and regulations.[28] The statute "represents a clean break from the past and bears very little resemblance to its predecessors".[29] Its purposes 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".[30]

[40] The statute sets out the means by which these purposes must be achieved,[31] and it must be interpreted so as to give effect to them.[32] The main objective is to protect

---

[27] Kelly-Louw "The Prevention and Alleviation of Consumer Over-indebtedness" (2008) 20 *SA Merc LJ* 200 at 204-5.

[28] Regulations issued under section 171 of the Act, published under GN R489 GG 28864, 31 May 2006, and amended by GN R1209 GG 29442, 30 November 2006 and GN R604 GG 30713, 29 May 2008.

[29] Otto and Otto *The National Credit Act Explained* 2 ed (LexisNexis, Durban 2010) at para 2.3.

[30] Section 3.

[31] Section 3(a)-(i) provides that these purposes are to be advanced by—

> "(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
>
> (b) ensuring consistent treatment of different credit products and different credit providers;
>
> (c) promoting responsibility in the credit market by—

consumers. But in doing so, the Act aims to secure a credit market that is "competitive, sustainable, responsible [and] efficient".[33] And the means by which it seeks to do this embrace "balancing the respective rights and responsibilities of credit providers and consumers".[34] These provisions signal strongly that the legislation must be interpreted without disregarding or minimising the interests of credit providers. So I agree with the Supreme Court of Appeal that—

(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;

(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by—

(i) providing consumers with education about credit and consumer rights;

(ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and

(iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;

(f) improving consumer credit information and reporting and regulation of credit bureaux;

(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

[32] Section 2(1).

[33] Section 3.

[34] Section 3(d).

> "[t]he interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider."[35] (Footnote omitted.)

I also agree that "whilst the main object of the Act is to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked".[36] (Footnotes omitted.)

[41] While the Act deals mainly with commercial transactions between credit providers and consumers, as defined, its provisions also have a significant impact on aspects of public law. It introduces new forms of protection for consumers. These include regulation of the consumer credit industry,[37] prohibiting credit providers from extending "reckless credit",[38] and mechanisms to assist over-indebted consumers to manage their debt burden.[39]

[42] An innovation is the NCR, whose functions include developing public awareness of consumer credit matters,[40] auditing credit providers[41] and reviewing legislation.[42]

---

[35] *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at para 2.

[36] *Rossouw* above n 3 at para 17, per Maya JA.

[37] Sections 39-59.

[38] Section 80 defines "reckless credit". Section 81(3) provides that a credit provider "must not enter into a reckless credit agreement with a prospective consumer". Material untruthfulness on the part of a consumer is a complete defence to an allegation that a credit agreement is reckless (section 81(4)).

[39] Section 79 defines "over-indebtedness".

[40] Section 16(1)(a). For the NCR's role in initiating declaratory litigation, see [35] above.

[41] Section 16(1)(d).

[42] Section 16(1)(g).

Consumers and others may submit complaints about alleged contraventions of the Act to the NCR.[43] A further innovation is the establishment of a National Consumer Tribunal[44] (Tribunal), which has countrywide jurisdiction,[45] and the power to adjudicate certain complaints.[46] The statute's provisions that invest the Tribunal with jurisdiction are crafted so that it works alongside consumer courts created by provincial legislation.[47] An appeal lies to the High Court against the Tribunal's orders,[48] except those made by consent.[49]

[43] The statute was brought into operation in stages[50] and came fully into force on 1 June 2007. That too is when the provisions at issue, sections 129 and 130, came into

[43] Section 136(1).

[44] Section 26.

[45] Section 26(1)(a).

[46] Section 141.

[47] Sections 140-1.

[48] Section 148(2)(b).

[49] Section 138.

[50] The National Credit Act came into operation in three phases (see Proc 22 in GG 28824, 11 May 2006):

- A large part came into operation on 1 June 2006, namely sections 1-25, 35-59, 69, 73, 134-62 and 164-73, together with Schedules 1-3. These provisions included those dealing with the statute's application, the establishment of the NCR, registration requirements and procedures for credit providers, debt counsellors and credit bureaux.
- On 1 September 2006, the Tribunal was established and the enabling provisions, sections 26-34, were brought into effect. Certain sections dealing with the credit information held by credit bureaux and consumers' rights to challenge it, sections 67-8, 70 and 72 also came into operation on this date.
- The remaining provisions (sections 60-6, 71, 74-133 and 163) came into operation on 1 June 2007. These included the provisions dealing with the rights of consumers; credit marketing practices; over-indebtedness and reckless credit; consumer credit agreements; the permitted interest rates and other costs of credit; collection and repayment of credit agreements; and the debt collecting procedures.

I am indebted for this exposition in large part to Kelly-Louw "The Prevention and Alleviation of Consumer Over-indebtedness" (2008) 20 *SA Merc LJ* 200 at 207, fn 31.

operation. It is necessary to set them out in full. Section 129 is headed "Required procedures before debt enforcement". It reads:

> "(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), or in section 86(10),[51] as the case may be; and
>
> (ii) meeting any further requirements set out in section 130.
>
> (2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.
>
> (3) Subject to subsection (4), a consumer may—
>
> (a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and
>
> (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.
>
> (4) A consumer may not re-instate a credit agreement after—
>
> (a) the sale of any property pursuant to—

[51] Section 86 provides for debt review. Section 86(1) provides that a consumer may apply to a debt counsellor to be declared "over-indebted". A debt review application may not be made if the credit provider has proceeded to take the steps contemplated in section 129 to enforce the agreement (section 86(2)). The Supreme Court of Appeal held in *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at para 14 that by giving the section 129(1)(a) notice itself the credit provider has taken "steps" contemplated in section 86(2), and therefore that debt review is no longer available to the consumer.

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123." (Footnote added.)

[44] Section 130 is headed "Debt procedures in a Court". It provides:

"(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.

(2) In addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if—

(a) all relevant property has been sold pursuant to—

(i) an attachment order; or

(ii) surrender of property in terms of section 127; and

(b) the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.

(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 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;

(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and

(c) that the credit provider has not approached the court—

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii) despite the consumer having—

(aa) surrendered property to the credit provider, and before that property has been sold;

(bb) agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement;

(cc) complied with an agreed plan as contemplated in section 129(1)(a); or

(dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).

(4) In any proceedings contemplated in this section, if the court determines that—

(a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplated in subsection (3)(c) 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;

(c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may—

(i) adjourn the matter, pending a final determination of the debt review proceedings;

(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or

(iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b);

(d) there is a matter pending before the Tribunal, as contemplated in subsection (3)(b), the court may—

(i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or

(ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination; or

(e) the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter."

[45] Section 129(1)(a) requires a credit provider, before commencing any legal proceedings to enforce a credit agreement,[52] 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".[53] 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. So, in effect, the notice is compulsory.[54]

[52] The Supreme Court of Appeal has held that this includes legal proceedings to cancel the agreement: *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at para 12.

[53] Id at para 8, quoting CM van Heerden and N Campbell *Guide to the National Credit Act* (2008) Service Issue 2 at 12-7 and 12-8.

[54] See *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at para 8. It was held in *African Bank Ltd v Myambo NO and Others* 2010 (6) SA 298 (GNP) at 311A-D (judgment of the majority of the Full Court) that since the allegation that notice has been given completes the cause of action, it must be

[46] One of the means by which the legislation expressly provides for its purposes[55] to be pursued is through "consensual resolution of disputes arising from credit agreements".[56] Section 129(1) is pivotal to this. It precludes legal enforcement of a debt before the credit provider has suggested to the consumer that he or she explore non-litigious ways to purge the default. Specifically, the notice must "propose" that the defaulting consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud, with the intent that the parties resolve their dispute, or agree on a plan to remedy the default.

[47] The NCR characterised the notice as a vital safety valve designed to prevent unnecessary litigation and premature foreclosure on consumers' assets. For its part, SERI contended that the notice was so pivotal that the legislation demands that a consumer must actually be made aware of the options it sets out before legal proceedings can be commenced. The requirement of actual receipt is, SERI contended, "hardwired" into the provision.

[48] SERI urged that in practical terms this requires the credit provider to satisfy the court on a balance of probabilities that the notice was in fact delivered to the consumer,

---

contained in the summons or letter of demand, and not in the request for judgment by consent. This point does not arise in these proceedings.

[55] Section 3 is set out in [39] above.

[56] Section 3(h). Sub-paragraphs (a) to (i) are set out above n 31.

and came to his or her notice. Accordingly SERI sought an order declaring that section 129(1)(a) "requires that the notice issued in its terms comes to the attention of the consumer".

[49] The NCR likewise laid emphasis on the objectives of the notice requirement, and on its pivotal position in the statutory scheme. But it contended for less than SERI. The NCR argued that the notice should come to the consumer's attention "insofar as possible". In practical terms, it contended, this means that the provision would be satisfied when the credit provider shows that it has taken the steps necessary to draw the notice to the attention of the *reasonable* consumer. While this means a court must be "satisfied" that the notice was received at the consumer's stipulated address, proving this will normally require something less: the credit provider must show only that the notice was delivered to the appropriate post office, and that it has not been returned to sender. Where an "opportunistic" consumer deliberately declines to collect a notice, the NCR contended that the credit provider can protect itself by enlisting the Sheriff of the Court to serve the notice personally on the consumer.

[50] The Bank and BASA supported *Rossouw*. They contended that, read together, sections 129 and 130 require the credit provider to prove only "delivery", and for this proof of despatch of the notice (and not receipt at the consumer's address, nor delivery to the post office in question) would be sufficient. BASA contended that the Act provides that accurate despatch of the notice to the consumer's chosen domicilium, email address

or fax number constitutes compliance with the credit provider's obligation to deliver. The legislation explicitly allocates the risk of non-delivery to the consumer, and this it contended is consistent with the Constitution.

[51] At the heart of the conflict between the contending positions lies a difference in method. This is whether section 129(1)(a) should be read in isolation from, or in conjunction with, section 130. The Supreme Court of Appeal in *Rossouw* read the two provisions together, but gave primacy to section 130, by focusing on what the statute required a credit provider to do to "deliver" a section 129 notice to the consumer.[57] SERI and the NCR strongly criticised this, urging this Court instead to adopt the approach taken in judgments that read section 129(1)(a) separately from, or gave primacy to it over, section 130.[58]

[52] In my view, the notice requirement in section 129 cannot be understood in isolation from section 130. This emerges from three considerations.

[53] First, it is impossible to establish what a credit provider is obliged and permitted to do without reading both provisions. Thus, while section 129(1)(b) appears to prohibit the commencement of legal proceedings altogether ("may not commence"), section 130 makes it clear that where action is instituted without prior notice, the action is not void.

[57] *Rossouw* above n 3 at para 22, per Maya JA.

[58] *Firstrand Bank Ltd v Dhlamini* 2010 (4) SA 531 (GNP) at paras 23-4; compare *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D&CLD) at paras 54-5.

Far from it. The proceedings have life, but a court "must" adjourn the matter, and make an appropriate order requiring the credit provider to complete specified steps before resuming the matter.[59] The bar on proceedings is thus not absolute, but only dilatory. The absence of notice leads to a pause, not to nullity. But to deduce this, it is necessary to read section 129 in the light of section 130. 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).

[54] The second consideration is how the notice provision itself is expressed in the two sections. They both require that notice be given, but do so in very different ways. Section 129(1) says that legal proceedings may not be commenced before the credit provider "draw[s] the default to the notice of the consumer",[60] or before "first providing notice to the consumer".[61] The word "notice" here shifts between two meanings: the first time it is used, it means the attention of the consumer; the second time, the notice itself. The first use of "notice" indeed requires, as SERI and the NCR urge, that the consumer must not only receive the notice but also take notice of it. Section 130(1)(a), however, uses one of these meanings of notice only. It permits court proceedings if 10 business days have passed "since the credit provider delivered a notice to the consumer as

[59] Section 130(4)(b)(i) and (ii).

[60] Section 129(1)(a).

[61] Section 129(1)(b)(i).

contemplated" in section 129(1).[62] It is true that this refers back to section 129. But the reference back is to delivery of "a notice" to the consumer as contemplated in section 129. The indefinite article indicates that what section 130 requires is delivery of a notice contemplated in section 129, that is, the notice itself.

[55] Thus, while section 129 focuses on the consumer to whom the credit provider must furnish notice, and to whose "notice" the information must come, section 130 tells the notice-provider what must be done to fulfil the requirements of section 129, which is to "deliver" a notice as contemplated in section 129(1).

[56] I appreciate the force of the argument that the protection of consumer rights requires that primacy be given to section 129(1);[63] but neither logic nor a coherent approach to meaning allow us to ignore section 130(1)(a). The provisions cannot be approached by sequestering them from each other. Their effect must be determined by an integrated approach to their meaning.

[57] That this is necessary appears also from a third aspect. If section 129(1)(a) is read in isolation, it seems to impose an obligation that, seen in isolation, may seem impossible

[62] More fully, section 130(1)(a) refers to a notice "contemplated in section 86(9), or section 129(1), as the case may be". All parties agreed that "section 86(9)" was a patent legislative mistake or typographical error, and that the enactment must read "section 86(10)". Section 86(10) allows a credit provider to give notice to a consumer who is in default under a credit agreement that is being reviewed "to terminate the review" 60 business days after the consumer applied for the review.

[63] *Firstrand Bank Ltd v Dhlamini* 2010 (4) SA 531 (GNP) at paras 23-4.

to fulfil. SERI sought an order that the notice must come "to the attention of the consumer". That is indeed what section 129 requires, but the critical question is what the statute requires a credit provider to prove to establish this. What has come to the attention of a consumer will almost always be known only to him or to her. 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. This requires the credit provider to establish, to the satisfaction of the court from which enforcement of a credit agreement is sought, that it has delivered a notice to the consumer as contemplated in section 129.

[58] To differing degrees, both SERI and the NCR accepted that the statute does not require the credit provider to prove that the notice actually came to the attention of the consumer, for what they sought in practical terms was not full-fledged enforcement of an "actual notice" provision. SERI, though seeking a declaration that the legislation demands actual notification, conceded that in practice the credit provider cannot be required to prove conclusively that the consumer has received and read the notice. And the NCR's position was only that the credit provider must show that it has taken the steps necessary to ensure that the consumer, acting reasonably, and not evasively or negligently, receives the notice.

[59] So the notice requirement cannot be understood by focusing solely on section 129. But this does not diminish the significance of that provision. As SERI and the NCR

contended, one of the statute's core innovations is significantly consumer-friendly and court-avoidant procedures. These procedures are designed to help debtors to restructure their debts, or find other relief, before the guillotine of cancellation or judicial enforcement falls.

[60] It is true that those procedures are available to consumers from the outset of the credit relationship. Indeed, as the Bank pointed out, the Regulations require that most[64] credit agreements include, from their inception, a statement of the consumer's right to apply for alternative dispute resolution and for debt counselling.[65] But access to debt counselling and extra-judicial resolution will undoubtedly have their most potent impact when the guillotine is about to fall. And it is at this point, before the credit provider resorts to court process, that the legislation insists the consumer should have the benefit of a notice. This plain statutory objective must significantly influence the meaning we give to "deliver" in section 130. It is to that I now turn.

Meaning of "delivered" in section 130

[61] Determining what "delivered" means in section 130 is not easy. The definitions section of the statute does not define the word. Nor does section 130. And, though they

[64] The requirement does not apply to "small" credit agreements. By GN R713, GG 28893, 1 June 2006, these are specified as credit facilities or debts (apart from mortgages or credit guarantees) lower than R15 000. See section 9(2), read with section 7(1)(b).

[65] Regulation 31 specifies requirements for "intermediate" or "large" agreements. They must contain a statement of the consumer's rights to resolve a complaint by way of alternative dispute resolution, to file a complaint with the NCR, and to make an application to the Tribunal (Regulation 31(2)(w)). They must also contain a statement of the consumer's right to apply to a debt counsellor to be declared over-indebted in terms of section 86, and the process to be followed (Regulation 31(2)(BB)).

could have done so, and even seem to have tried to do so,[66] the Regulations do not prescribe any method for delivery as envisaged in section 130. What the credit provider has to do to establish that it has "delivered a notice to the consumer as contemplated in . . . section 129(1)" must therefore be determined by taking account of the high importance of the section 129 notice, against the background of the statute's other provisions that indicate how delivery of notices must be effected. These are three: section 65(1) and (2), section 96 and section 168.

[62] Section 65 is headed, "Right to receive documents". Sub-section (1) provides that "[e]very document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any." "Prescribed" means "prescribed by regulation".[67] The Regulations provide that, in them, unless otherwise provided for, "delivered" means "sending a document by hand, by fax, by e-mail, or registered mail to an address chosen in the agreement by the proposed recipient, [or,] if no such address is available, [to] the recipient's registered address".[68] But the Regulations do not specifically "prescribe" any manner for delivery of the section 129 notice. Hence, the

[66] The definitions section of the Regulations provides that the words and expressions defined bear the meaning given "in these Regulations". Since the statute clearly envisages that the Regulations will define "delivery" not for the purposes of the Regulations, but for the purposes of the statute, this seems to have been an unfortunate drafting slip-up. A simple amendment to the Regulations to make clear that the definition of "delivery" applies not to the Regulations, but to section 129 and section 130, may have forestalled this litigation.

[67] Section 1 of the Act.

[68] Regulation 1 to the Act.

definition is inapplicable.[69] And, since the Regulations cannot be used to interpret the Act,[70] we are brought back to the provisions of the Act itself.[71]

[63] Section 65(2) is relevant, especially since it appears in Part A of Chapter 4 of the Act, which is concerned with "consumer rights". It provides:

> "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)."

[64] Section 96 appears in Chapter 5 of the Act, which regulates consumer credit agreements. It appears in Part B of that Chapter, which deals with "disclosure, form and effect of credit agreements". The provision is headed, "Address for notice". It reads:

---

[69] See above n 66.

[70] *Rossouw* above n 3 at paras 24-7, per Maya JA.

[71] The Interpretation Act 33 of 1957 is also of no help. Section 7, "Meaning of service by post", provides that "[w]here any law authorises or requires any document to be served by post, whether the expression 'serve' or 'give' or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a registered letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post." This offers no shortcut because the Interpretation Act applies only "unless the contrary intention appears" in any statute (section 1). This means that we are driven to establish first what the meaning of the NCA is.

> "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)."

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

[65] Section 168, which appears in Chapter 8, is concerned with the enforcement of the Act. It appears in Part C, which concerns "miscellaneous matters". It provides:

> "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."

[66] None of these provisions is made applicable to section 130 in express terms. This is a matter for regret. The lack of clarity in the drafting of the Act has justly been bemoaned.[72] Nevertheless, each of these provisions appears to have some bearing on the meaning to be given to "delivered" in section 130. This is so because section 65(2) is

[72] *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at para 2 ("Numerous drafting errors, untidy expressions and inconsistencies" make interpreting the Act "a particularly trying exercise").

applicable where "no method has been prescribed for the delivery of a particular document to a consumer" (and none has been prescribed for section 130); section 96(1) applies because the notice envisaged in section 130 is a "legal notice" for a purpose contemplated in the credit agreement; and section 168 is pertinent because it is titled "serving documents". To these indications of meaning must be added the considerations already mentioned, that section 130 is inextricably conjoined to section 129, and the especial statutory significance of the notice requirement.

[67] So while there is no clear answer to the meaning of "delivered" in section 130, the statute does give clues to it. First, section 65(2) indicates that delivery entails making the document sought to be delivered "available" to the consumer through one or more of the stipulated mechanisms. One of those is by ordinary mail.[73] Cumulatively with these options ("and"), the document must also be delivered to the consumer "in the manner chosen by the consumer" from the options made available in paragraph (a).

[68] Section 65 thus contemplates that delivery is effected when a document is made available to a consumer "by ordinary mail". I agree with the Supreme Court of Appeal that section 65(2) covers a consumer's choice of registered mail. This is not only because postal delivery is expressly sanctioned, and registered post is "a more reliable means" of postal delivery,[74] but also because "the greater includes the lesser."[75] But, the fact that

[73] Section 65(2)(a)(i).

[74] *Rossouw* above n 3 at para 30, per Maya JA.

there is no practical means of proving that a notice sent by ordinary mail reaches the addressee suggests that, for section 130 "delivery" to be achieved, more is needed. At the very least, despatch of the section 129 notice must be effected by registered mail.

[69] Section 96(1) requires delivery of legal notices "at the address" of the other party "as set out in the agreement". The same logic applies. Since proof of actual delivery to a specified address is not practicable, despatch to a registered address, at least, must be required for delivery under section 130.

[70] This emerges too from section 168, which stipulates that a document that must be served in terms of the Act will have been properly served when it has been "sent by registered mail to that person's last known address." Here, proof of despatch by registered mail is clearly stated to be sufficient for purposes of service. However, the especial importance of the section 129 notice suggests that registered despatch is not enough, and that something more may be required.

[71] Section 65(2), which contemplates that delivery can be effected by ordinary mail, and section 168, which stipulates that despatch by registered mail constitutes proper service of a notice, both indicate that despatch by registered mail is contemplated for delivery under the Act. Section 96 requires delivery "at the address" set out in the agreement, but since this provision itself uses "deliver", which is not defined in the

[75] Id at para 57, per Cloete JA.

statute, we are driven to the other provisions to deduce what delivery must entail, and they indicate, for the reasons I have given, that despatch by registered mail is indeed contemplated.

[72] The Supreme Court of Appeal in *Rossouw* derived the meaning of "delivered" primarily from the provisions of section 65(2). It is correct that this provision yields the answer that statutory "delivery" is achieved through despatch. But in my respectful view that means of interpretation does not give enough weight to the particular setting of the requirement in section 130, and its close conjunction with section 129. That provision in turn embeds a notice that is pivotal to the statute's innovative entrenchment of court-avoidant and settlement-friendly processes. Section 129 requires that notice be provided to the consumer, and the obligation in section 130 to deliver that notice must be read in the light of the importance of that notice.

[73] It is correct, as the Supreme Court of Appeal observed, that section 65(2) expressly attaches value to the communication method "chosen by the consumer from the options made available" in the provision, and that choice entails responsibility.[76] On the other hand, as that Court also pointed out, many credit providers use standard form agreements that leave consumers very little choice.[77] In addition, a fair reading of the statute

[76] Id at paras 30-2, per Maya JA.

[77] Id at para 58, per Cloete JA (a consumer "could hardly complain if the method of delivery of a document chosen by him or her proves ineffective", but "for so long as credit providers employ standard form contracts which make provision for one possibility only", the argument "loses sight of reality").

demands that the consequences ascribed to the consumer's choice of communication method be off-set against the pivotal significance of the section 129 notice.

[74] 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.

[75] Hence, where 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. Even though registered letters may go astray, at least there is a "high degree of probability that most of them are delivered."[78] 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

[78] *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 (4) SA 994 (A) at 1001B, quoted by Cloete JA in *Rossouw* above n 3 at para 57.

attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by section 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.

[76] In practical terms, this means the credit provider must obtain a post-despatch "track and trace" print-out from the website of the South African Post Office. As BASA's submission explained, the "track and trace" service enables a despatcher who has sent a notice by registered mail to identify the post office at which it arrives from the Post Office website. This can be done quickly and easily. The registered item's number is entered, the location of the item appears, and it can be printed.

[77] The credit provider's summons or particulars of claim should allege that the 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. 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.

[78] The evidence required will ordinarily constitute adequate proof of delivery of the section 129 notice in terms of section 130. Where the credit provider seeks default judgment, the consumer's lack of opposition will entitle the court from which enforcement is sought to conclude that the credit provider's averment that the notice reached the consumer is not contested.

[79] 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).

[80] In their bond agreement, the Sebolas and the Bank agreed that postal delivery could be used. They chose their North Riding post office box as the address to which notices could be delivered. Their agreement recorded that they accepted that notices posted to this address by registered post would be "regarded as having been received within 14 (fourteen) days after posting".

[81] I agree with the Supreme Court of Appeal in *Rossouw* that, "to be effective, the notice would have to comply both with the contract and with the Act."[79] So the Bank was obliged not only to send the notice to their address at the North Riding post office, which it did in fulfilment of its agreement with the Sebolas; the statute also obliged it to

[79] *Rossouw* above n 3 at para 57, per Cloete JA.

show that the notice actually reached the correct post office. That did not happen. The Sebolas were therefore entitled to rescission of the judgment granted against them. The proceedings against them should have been adjourned to allow the Bank to rectify the omission in regard to the notice.

[82] BASA strongly urged that requiring credit institutions to establish the likelihood of receipt would mean significantly more trouble and expense. It pointed out that debt recoveries are processed in bulk, and statutory notices despatched in great number. To require a credit provider in the ordinary course not only to prove despatch by registered mail, but also delivery at the correct post office is unjustified and would add considerable expense to the debt recovery process. This cost would be passed on to ordinary consumers – the very public the statute was enacted to protect – in the form of higher credit costs, making credit less accessible.

[83] I appreciate the force of these arguments. But they should not be overstated. This judgment requires credit providers, in the ordinary course, where mail is used, to establish delivery by registered post to the consumer's post office. That will complicate bulk despatches, but not significantly. More importantly, we must stay true to the statutory scheme. Section 129 requires that notice be provided to the consumer. If establishing this in the ordinary course adds some complexity to bulk processing of debt recoveries, that seems to me to be a consequence of a legislative scheme that seeks to

give consumers a last chance before court enforcement procedures drop the guillotine on them.

[84] I accept that this judgment may heighten the cost of credit, and that this will affect the pockets of not only credit institutions but also consumers, particularly those new to the credit market. That is a social burden the legislation imposes. The alternative would be to underplay the importance of the notice, and under-weigh the impact of the wording of section 129.

[85] To require mere despatch of the section 129 notice, as the Bank and BASA sought, under-appreciates its importance in the statutory scheme. It gives too little force to the plain wording of that provision, which requires that the notice come to the attention of the consumer. To require that the credit provider show that the notice reached the intended post office does add expense and effort to the recovery process, but it gives proper recognition to the statutory mechanisms designed to obviate court action. And court action is almost invariably much more expensive, and may be calamitous for the consumer. This the statute's notice requirement seeks to avoid.

[86] For these reasons, adding the indications the Act offers to the signal importance the notice occupies in the statutory scheme, I conclude that the obligation section 130(1)(a) imposes on a credit provider to "deliver" a notice to the consumer is ordinarily satisfied by proof that the credit provider sent the notice by registered mail to the address

stipulated by the consumer in the credit agreement, and that the notice was delivered to the post office of the intended recipient for collection there.

[87] 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 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.

[88] What the statute requires depends on the form of communication the credit provider uses. The Act clearly contemplates other forms of communication, including email and fax.[80] These proceedings do not require us to say anything about them.

[80] Section 65(2)(a).

[89] It follows that the appeal should succeed, and the Sebolas should be granted the costs they incurred in seeking to set aside the judgment granted against them.

Order

[90] The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal succeeds.
4. The order of the High Court is set aside and is replaced with the following:

   "The application for rescission is granted with costs."
5. The Bank must pay the Sebolas' costs in the Full Court and in this Court.

ZONDO AJ (Mogoeng CJ and Jafta J concurring):

Introduction

[91] Section 129(1)(a) of the National Credit Act[1] (NCA) reads:

> "(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

[1] Act 34 of 2005.

> 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."
>
> (Underlining added.)

The question for determination on the merits of this matter is: did Standard Bank draw the default of the Sebolas to their notice and make to them the proposal referred to in section 129(1)(a) of the NCA with the intent contemplated in section 129(1)(a) even though the letter that had been addressed to the Sebolas and sent by registered mail went astray and did not reach them? This raises the question: what does section 129(1)(a) mean when it says that the credit provider "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" and other persons and institutions mentioned therein[2] "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"?

[92] Cameron J has prepared a judgment (main judgment) in which he has set out all the relevant facts. I, therefore, do not propose to set out any facts in this judgment. He has also dealt with the jurisdiction of this Court, the issue of mootness, the condonation

[2] After this I shall only mention the debt counsellor and shall not also mention the alternative dispute resolution agent, consumer court or ombud with jurisdiction but I must be understood to be referring to them as well.

application and the application for leave to appeal. On those issues I am in full agreement with him.

[93] The main judgment says that:

(a) "[T]he critical question" in this case "is what the statute requires a credit provider to prove to establish [that a section 129(1)(a) letter came] to the attention of the consumer".[3]

(b) It will seem impossible for the credit provider to prove that a section 129(1)(a) letter reached the consumer.[4]

(c) If a credit provider sends a section 129(1)(a) letter by registered post, it will ordinarily be taken to have reached the consumer, and, the credit provider will be taken to have complied with section 129(1)(a), if the letter has reached the consumer's local post office.

(d) "The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer as required by section 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office."[5] (Underlining added.)

[3] Main judgment at [57].

[4] Id.

[5] Id at [75].

[94] I am unable to agree with the main judgment on paragraph 93(a) to (d) above. Furthermore, I am unable to agree with the interpretive approach adopted in the main judgment which focuses on the meaning of section 130(1) when the question before us for determination is not whether section 130(1) was complied with but whether section 129(1) was complied with.

[95] With regard to (a), in my view the question before us is one of the construction of section 129(1) and not one of evidence. The question that the main judgment says is the critical question in this case relates to a question of evidence. The determination of such a question cannot legitimately help to answer the question: what does section 129(1)(a) mean?

[96] As to (b), I am also unable to agree that it will ordinarily be impossible for the credit provider to prove that a section 129(1)(a) letter reached the consumer. If a credit provider elects to send an employee or agent to the consumer to give the latter a section 129(1)(a) letter personally and the employee or agent gives the letter to the consumer or even reads it to him before giving it to him – just like a sheriff does when he serves a court process on a person – the credit provider will have proof that the consumer was made aware of the default and the proposal. The employee or agent can depose to an affidavit. He can even secure a signature by the consumer to acknowledge receipt of the letter. If the credit provider sends a section 129(1)(a) letter by ordinary mail or by email

or fax and the consumer responds to it in writing or by telephoning the credit provider, the credit provider will have proof that the consumer was made aware in writing of the default and the proposal. The credit provider will depose to an affidavit to the effect that the consumer telephoned after receiving the section 129(1)(a) letter and discussed the contents thereof with the credit provider. If the consumer sends a written reply to the credit provider, that reply will serve as proof of receipt of the section 129(1)(a) letter by the consumer. If the consumer visits the credit provider's business premises to discuss the contents of a section 129(1)(a) letter, the credit provider can depose to an affidavit to the effect that the default was successfully drawn to the notice of the consumer and the section 129(1)(a) proposal was made to him because he reacted to the section 129(1)(a) letter. The same can be achieved if the credit provider makes use of a courier or of a sheriff.

[97] It must be remembered that, when a letter that is sent by registered post is collected from a post office, the post office will require the person collecting it to bring photographic identity to show that he or she is the person to whom the letter is addressed and he or she will have to sign that he or she received the letter. Accordingly, I do not think that there is a sufficient basis for the view that it will almost be impossible for the credit provider to prove that a section 129(1)(a) letter reached the consumer.

[98] Furthermore, the matter must not be decided on a basis which suggests that most people will dishonestly deny having received a section 129(1)(a) letter, when in fact they

have received it. In my view most people will admit receipt of correspondence if they received it. It will be a minority who will dishonestly deny having received correspondence which they actually received. It will be an even smaller minority that will deny receiving a letter when they actually received the letter and they know that it was a letter sent by registered post because it probably may be proved that they actually did receive the letter or that the probabilities are that they received the letter.

[99] In any event it is important to stress that the credit provider is free to choose any of the different methods of delivery because the section does not prescribe any method. Where the credit provider opts for delivery by mail, it makes its choice with the full knowledge that the burden rests upon it to prove that the default had been brought to the attention of the consumer, as well as the proposal to refer the credit agreement to a debt counsellor. The difficulties, if any, encountered by the credit provider in proving delivery under a method of its choice cannot determine the construction to be ascribed to section 129(1)(a). This is so even where the credit provider chooses the cheapest method because delivery costs are irrelevant to the construction of the section.

[100] The findings in paragraph 93 (c) and (d) above are related. They all relate to the main judgment's further finding about what the credit provider is required to do to comply with section 129(1)(a). That is to draw the default in repayments to the notice of the consumer and to make to him or her the proposal contemplated in section 129(1)(a).

The finding in the main judgment in (d) has no basis in the provisions of the statute whatsoever and no provisions thereof have been cited to support that finding.

[101] As to (c) above, this is a critical finding of the main judgment. Although in various parts of the main judgment statements are made to the effect that a section 129(1)(a) letter is required to reach the consumer or to come to the attention of the consumer, the effective and critical finding of the main judgment as to what the credit provider must do in order to "draw the default" in repayments "to the notice of the consumer" and make to him the proposal referred to in section 129(1)(a), and, therefore, to comply with section 129(1)(a) when it sends a section 129(1)(a) letter by registered post is 93(c) above. That is that it will ordinarily be enough if the letter reaches the consumer's local post office. This finding in the main judgment completely undermines the construction that section 129(1)(a) entails that the section 129(1)(a) letter must come to the attention of the consumer or that the default and the proposal must be conveyed to the mind of the consumer. Indeed, this finding effectively says that ordinarily a section 129(1)(a) letter need not reach the consumer and its contents need not reach the mind of the consumer. I am unable to agree with this.

[102] In my view, properly construed and analysed, the finding of the main judgment on section 129(1)(a) is that, although section 129(1)(a) entails that a section 129(1)(a) letter should reach the consumer or that the credit provider must make the consumer aware of the default and the proposal, when section 130(1)(a) and other provisions of the NCA are

taken into account, "ordinarily" section 129(1)(a) will have been complied with if a section 129(1)(a) letter that was sent by registered post reaches the consumer's local post office.[6] The main judgment is to the effect that, if a consumer informs the Court that he did not receive the letter and the Court believes him, the Court may adjourn the proceedings in terms of section 130(4) of the NCA. Either there is compliance when the letter reaches the consumer's local post office or there is compliance when the consumer is made aware of the default and the section 129(1)(a) proposal. In my view the latter reflects the legal position.

[103] I take the view that section 129(1)(a) means that the credit provider must, in writing, make the consumer aware of the fact that he is in default and of the credit provider's proposal that he refer the credit agreement to a debt counsellor so that, if there is a dispute between the parties about the credit agreement, they can try to resolve it, debt restructuring can be resorted to or the payments can be brought up-to-date.

[104] With regard to the main judgment's reliance upon the word "delivered" in section 130(1)(a) to justify not giving section 129(1)(a) its ordinary meaning, I take the view that that word must be given its ordinary meaning. If that word is given its ordinary meaning, section 130(1)(a) is not at odds with the clear language of section 129(1)(a). As will be seen later in this judgment, our case law is to the effect that the ordinary meaning of the

[6] See the main judgment at [76], [79], [85] and [87].

word "deliver" is "to hand over, transfer, commit to another's possession or keeping" of someone else.

[105] The effective conclusion reached in the main judgment as to what compliance with section 129(1)(a) entails, when a section 129(1)(a) letter was sent by registered post, does not, in my view, give proper weight to the fact that section 129(1)(a) was enacted primarily for the benefit and protection of the consumer, rather than that of the credit provider. Indeed, in my view that meaning is inconsistent with section 129(1)(a). Furthermore, that conclusion places the consumer in a worse position than he was at common law, where the creditor, seller or lessor had contractually undertaken to give the debtor a notice of a breach of contract and to give him an opportunity to purge the default before the creditor could exercise its right to cancel the agreement or to institute legal proceedings against the debtor.

[106] Finally, when one has regard to previous legislation which had some of the features of section 129(1)(a), one finds that case law interpreting such legislation also required that the debtor, purchaser or lessee had to receive the notice informing him of his default and calling upon him to remedy the breach before the seller or creditor could cancel the agreement or institute legal proceedings. I now proceed to deal with the question for determination.

[107] I begin by showing how problems similar to the one confronting the Court in the present case have been dealt with at common law. I trace the line of Appellate Division cases relating to notices of cancellation where the Appellate Division required actual knowledge. If, in that era, the Appellate Division advocated actual awareness, then I can see no reason why this Court, alive to the realities of South Africa, should not require actual knowledge in this time and age. I also refer under this part of the judgment to the law relating to the termination of a contract of employment, which similarly supports the proposition that, when a notice of termination of such contract is required to be given, the content of the notice must be conveyed to the other party for the termination to be effective or valid. I then turn to other statutes with provisions comparable, to some extent, to section 129(1)(a). Interpretations of the relevant provisions of those statutes are persuasive authorities for interpreting the present legislation in the manner that I propose. I then give a detailed examination of various provisions of the NCA and the purposes of the NCA to show that they support actual awareness. Even were those textual indicators not conclusive, any interpretation of the NCA must promote the purposes of the NCA, and actual awareness promotes not only consumer protection but also the use of non-judicial mechanisms for resolving disputes which the NCA so clearly requires.

The common law position

[108] At common law a party to a contract has the right to cancel or terminate a contract such as that of a lease or of employment by giving the other party a notice even if there

was no breach of contract by the other party unless the contract provides otherwise. In a case where such a party has to give the other party a notice of termination of the contract, the notice is required to be conveyed to the other party. I do not understand our case law to reveal any concern of insurmountable problems about proof of the conveyance of the notice to the other party. Furthermore, in those cases where a party such as a seller or lessor has contractually bound himself to give notice to the other party that the latter is in breach of his agreement and calls upon him to remedy the breach before he can exercise his right to cancel the agreement or to institute legal proceedings, the notice is required to reach the mind of the other party.[7]

[109] In *Swart v Vosloo*[8] the Court held that there had been no valid or effective cancellation of the lease where the lessor's letter of cancellation had not been seen by the lessee (even though it had been given to the lessee's employee at the bottle store, which was the subject of the lease, and the employee had put the letter on the lessee's desk), but the lessee had not seen the letter until after he had sent a letter to the lessor exercising his option to purchase the bottle store and the lessor had read the lessee's letter. In other words, the Court held that until the lessor's letter had come to the lessee's attention, the lessor's decision to cancel the lease was not effective in law.

[7] *Swart v Vosloo* 1965 (1) SA 100 (AD) particularly at 105H, 113F-H and 114H-115A; *Miller and Miller v Dickinson* 1971 (3) SA 581 (A) particularly at 588E-F and *Fourie v Olivier en 'n Ander* 1971 (3) SA 274 (TPA).

[8] Above n 7.

[110] In *Swart v Vosloo* the determination of the matter revolved around the construction to be given to the words "the lessor shall be entitled . . . to declare this lease cancelled and terminated forthwith".[9] There were two questions for determination in the matter, namely:

(a) whether the lessor had to give notice to the lessee of his decision; and

(b) if so, whether the cancellation only became effective when it actually reached the mind of the lessee.

[111] After discussing the basic principles of the law of contract and cases such as *Noble v Laubscher*,[10] *Schuurman v Davey*,[11] *Jaffer v Falante*[12] and *Steyn's Foundry (Pty) Ltd v Peacock*,[13] Holmes JA summed up his conclusion thus: "It must be taken as settled that, in the absence of agreement to the contrary, a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party; and cancellation does not take place until that happens."[14] Although Holmes JA's judgment was a minority judgment, there was no disagreement between the majority and the minority on this point.

[112] The relevant provision of the lease under consideration in *Swart v Vosloo* was to the effect that the lessor was entitled to declare the contract cancelled and terminated

[9] Above n 7 at 105H.

[10] 1905 TS 125.

[11] 1908 TS 664.

[12] 1959 (4) SA 360 (C).

[13] 1965 (4) SA 549 (T).

[14] *Swart v Vosloo* above n 7 at 105G.

forthwith. It did not expressly say to whom the lessor was entitled to make the declaration. Nevertheless, Holmes JA held that the clause meant that the lessor had to declare to the lessee. The basis for this conclusion was given as follows:

> "Now 'declare' means to make known which necessarily connotes a person or persons to whom something is made known. And in the context of the lease the obvious and only such person is the lessee. Now you cannot make something known to him unless it reaches his mind. Hence this provision does not vary the basic rule discussed above: it is in conformity with it. This answers the contention that the lease expressly empowers the lessor to cancel without notice to the lessee."[15] (Underlining added.)

Writing for the majority in the same case, Wessels JA wrote:

> "In my opinion, however, as a matter of language, the word 'declare' and most, if not all, of its synonyms clearly connote (subject possibly to context and definition by the parties to a contract) an activity which concerns not only the person making the declaration but some other person or persons as well. A verbal declaration would ordinarily be a completely sterile activity unless it were to be addressed to some person or persons."[16]

[113] Wessels JA referred to judgments which he said appeared to be based—

> "upon an acceptance of the proposition that our law requires a party who elects to exercise a right of cancellation to notify the defaulting party of his decision to terminate the contract. It is, furthermore, implicit in those judgments that, if a party relies upon intimation contained in a legal process, such intimation operates to terminate the contract if it is brought to the notice of the defaulting party by the actual service upon him of the process embodying the intimation."[17]

[15] Id at 105H.

[16] Id at 113F-G.

[17] Id at 114H-115A.

Wessels JA then concluded that the provision in the forfeiture clause of the lease was to be construed as meaning that, if the lessor decided to "avail himself of the right of terminating the lease, his election to do so was to be intimated or made known to the lessee."[18]

[114] Wessels JA also pointed out that the—

> "termination of a contract has important consequences upon the reciprocal rights and duties of the parties thereto and this would seem to provide further justification for holding that, if a party decided to exercise a right to declare a contract cancelled, he should intimate his election to the defaulting party effectively to terminate the contract, unless that contract itself provides, either expressly or by necessary implication, that termination may be effected in some manner other than communication to the defaulting party."

In this regard Wessels JA referred to the remarks of Herbstein J in *Jaffer v Falante*[19] and those of Hoexter JA in *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co. Ltd*[20] in regard to an insurer's duty to inform the insured if it had decided to repudiate liability in respect of a claim under the policy.[21]

[18] Id at 115D.

[19] Above n 12 at 362.

[20] 1963 (1) SA 632 (A) at 640C.

[21] *Swart v Vosloo* above n 7 at 115E-G.

[115] If the Court in *Swart v Vosloo* could hold, as it did unanimously, that a provision of the lease which entitled the lessor "to declare [the] lease cancelled and terminated forthwith" meant that the declaration had to reach the mind of the buyer, how can it be held that the provision in section 129(1)(a) means that the default need not reach the mind of the consumer? In the relevant clause of the lease in *Swart v Vosloo*, words such as "to the lessee" were not included to make it clear that the declaration was to be made to the lessee. Yet the Court held that the use of the word "declare" meant that the declaration had to reach the mind of the lessee. In section 129(1)(a) the provision includes the words "to the notice of the consumer" to indicate to whose notice the credit provider has to draw the default. Furthermore, although in section 129(1)(a) there is no express reference as to whom the proposal must be made, it is necessarily implied that it is to be made to the consumer. How, then, can it be said that the NCA does not contemplate that the proposal must reach the mind of the consumer? The case of *Fourie v Olivier en 'n Ander*[22] supports this reasoning since the Court held that the notice which the seller was required to give to the purchaser, to afford him the opportunity to purge the default, was required to be received by the purchaser. In that case two letters had been returned undelivered.

[116] In *Miller and Miller v Dickinson*[23] the parties had entered into a deed of sale in respect of a certain property. The respondent was the purchaser and the appellant the

[22] 1971 (3) SA 274 (T).

[23] Above n 7.

seller. The property was adjacent to the respondent's parents' property. In the preamble to the deed of sale the respondent was described as being "of Box 148 Randburg". In clause 17 of the deed of sale the blank space in which the purchaser's address should have been filled in to indicate where the purchaser would receive all notices under the deed was not filled in. Clause 13 read as follows in so far as it is relevant:

> "Should the purchaser fail to pay on due date any instalment or other imposts as provided for in this deed of sale, but not otherwise, the sellers shall be entitled to give the purchaser written notice requiring the purchaser to remedy such default, and should the purchaser within twenty-one (21) days after the posting of such notice fail to remedy the default then and in that case, the sellers shall without further notice, have the option:
>
> (a) to declare this deed of sale cancelled . . . or
>
> (b) to sue forthwith for the recovery of the whole of the balance outstanding under this deed of sale, or for payment of any arrear instalments as the sellers may think fit."[24]

[117] After the respondent had fallen into arrears with his payment the appellants' attorney sent him two registered letters at different times, one notifying the respondent of his default and the other cancelling the agreement. Both letters were returned by the postal authorities marked "unclaimed". The attitude of the appellants was that the notices were as valid as if the respondent had received them. The respondent did not deny that Box 148, Randburg was his postal address. He said that he had made an arrangement with his parents to collect his post for him and they had from time to time given him mail from the postal box. He made this arrangement because he had relocated.

[24] Id at 586H–587A.

[118] Following *Swart v Vosloo*,[25] the High Court held that, as the respondent had not received the letters, there had been no valid cancellation of the sale agreement. On appeal the Appellate Division followed its decision in *Swart v Vosloo*. However, it noted that the deed of sale contemplated two notices to be given by the sellers in the event of the purchaser failing to comply with the terms of clause 13. One of those notices was to give an opportunity to the defaulting party to remedy its default. The Court then said:

> "If a declaration of cancellation of an agreement by a creditor, in order to be effective, has to be brought to the mind of the debtor, in the absence of an agreement to the contrary, a notice to remedy a default before such cancellation, would, I think, *a fortiori* be required to be received by the debtor. The position in the present case seems to be no different, in the absence of an agreement, from that of the case of a creditor generally who has to put a debtor *in mora* and who, if he cannot find the debtor, must, if necessary, resort to a process of summons *in judicio*."[26] (Underlining added.)

[119] The common law rule that a notice of termination of a contract by one party must reach the mind of the other party to the contract in order to be effective also applies to contracts of employment. In *Transport & Allied Workers Union & Others v Natal Co-operative Timber Ltd*[27] (*NCT*) the Court held that the notice of termination of a contract of employment "must be given to the employee *personally* unless he has appointed an

[25] Discussed above at [109]-[115].

[26] *Miller and Miller v Dickinson* above n 7 at 588E-F.

[27] (1992) 13 ILJ 1154 (D).

agent with authority to receive such notice on his behalf (cf *Honono v Willowvale Bantu School Board & Another* 1961 (4) SA 408 (A) at 414H)."[28]

[120] At common law a notice of the termination of a contract, including a contract of employment, must also be clear, unconditional and unequivocal.[29] In the *NCT* case the Court dealt with the rationale behind the requirements that the notice of termination of a contract must be clear, unequivocal and unconditional. McCall J said:

> "It seems to me that the rationale behind the requirements that the notice must be clear and unequivocal and that it must be unconditional is, as far as the employee is concerned, the same. He must be left in no doubt as to where he stands as far as his continued employment is concerned as to what the employer's intentions are with regard thereto. In the case of a dismissal, on notice, for misconduct or incompetence for example, he must know that his employer has elected to terminate his contract from a specific date, so that he may govern his conduct accordingly. He may decide to accept the termination . . . [or] claim specific performance".[30]

A little later, McCall J said of the employee in such a case:

> "In any case, he must know the precise time from which the termination takes effect, so that he can judge whether he has been given sufficient notice, either under the relevant statutory provision governing his employment or under the common law, as the case may

[28] Id at 1160E.

[29] See *NCT* above n 27 at 1160F-1162G and the authorities cited therein. In the High Court decision in *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1984 (1) SA 443 (WLD) Nicholas J said: "in order to be effective a notice of termination of a contract must be clear and unequivocal." That statement was approved on appeal in *Putco Ltd v TV Rradio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 830E and subsequently again in *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 385G.

[30] *NCT* above n 27 at 1162G-I.

> be, or that he has been tendered the correct amount of money in lieu of the requisite notice, if that is what the employer elects to do."[31]

In my view, although this was given as a rationale for the requirement that a notice of termination must be clear, unequivocal and unconditional, it equally explains why the notice of termination must be communicated to the employee or why the notice must come to the attention of the employee before it can be said to be effective.

[121] There are two reasons why I have referred to the fact that at common law the notice of termination of a contract as well as the notice placing the other party *in mora* are required to be communicated to the other party to the contract before they can be effective in law.

[122] The first is that section 129(1)(a) also contains a provision that obliges the credit provider, inter alia, to put the consumer *in mora* before it can exercise its right to cancel the agreement or institute legal proceedings. The second is that section 129(1)(a) was enacted primarily, if not exclusively, for the benefit and protection of the consumer. If that is correct, the correct construction of section 129(1)(a) cannot conceivably be one that puts the consumer in a worse position than the position at which he was at common law. Under the common law, where the creditor had undertaken the obligation to give a debtor a notice of a breach of contract and an opportunity to purge that breach, such

[31] Id at 1163A.

notice had to be conveyed to the mind of the debtor before it could be said that the creditor had given the debtor notice of such breach or notice of termination and could cancel the agreement. The proposition that section 129(1)(a) does not mean that the consumer's default and the credit provider's proposal should be brought to the consumer's actual attention and that the section is complied with if the section 129(1)(a) letter reaches the consumer's local post office places the consumer under the NCA in a worse position than a debtor was at common law where the creditor had contractually undertaken to put the debtor *in mora* and yet section 129(1)(a) was primarily enacted for the benefit and protection of the consumer.

[123] The other reason is that, whatever difficulties may be thought to be inherent in requiring that a notice of termination of a contract be received by the other party to the contract, they were not considered at common law sufficient to justify requiring that a notice of termination need not be received by the other party. Surely in this day and age when communication is better and faster than it was then, the proposition that a section 129(1)(a) letter, which is a very important letter, need not be received by the consumer cannot be justified.

Interpretation of similar statutes

[124] Now that we know the position at common law on the issue under consideration in this matter, it is necessary to consider what our jurisprudence is in regard to the interpretation of other statutes which contained provisions which deal with the situation

where the seller or creditor was required to alert the purchaser or debtor of default in payments before the seller or creditor could either cancel the agreement or institute legal proceedings against the debtor.

[125] Before 1965, section 12 of the Hire-Purchase Act[32] (1942 Act) read as follows:

> "No seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce—
>
> . . .
>
> (b) any provision in the agreement for the payment of any amount as damages, or for any forfeiture or penalty, or for the acceleration of the payment of any instalment, unless he has made written demand to the buyer to carry out the obligation in question within a period stated in such demand, not being less than ten days, and the buyer has failed to comply with such demand."

In 1965 section 12 was amended. The relevant portion thereafter read as follows:

> "No seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce—
>
> . . .
>
> (b) any provision in the agreement for the payment of any amount as damages, or for any forfeiture or penalty, or for the acceleration of the payment of any instalment, unless he has by letter handed over to the buyer or sent by registered post to him at his last known residential or business address, made demand to the buyer to carry out the obligation in question within a period stated in such demand, not being less than ten days, and the buyer has failed to comply with such demand."[33]

[32] Act 36 of 1942.

[33] Act 30 of 1965.

[126] It is clear from section 12(b), as it was before its amendment in 1965, that its purpose was to preclude the seller from taking certain steps against the purchaser as a result of the latter's breach of their agreement. What the seller was precluded from doing was to enforce any provision of the agreement for the payment of damages, penalty or for forfeiture or for the acceleration of the payment of any instalment unless—

(a) he had made a written demand to the buyer to carry out the obligation in question within a period specified in the demand which had to be 10 days or more; and

(b) the buyer had failed to comply with the demand to carry out the obligation in question.

This means that, prior to the amendment of 1965, section 12(b) of the 1942 Act precluded the seller from instituting proceedings to enforce an agreement without first making a "written demand to the buyer to carry out the obligation in question" within the period specified in the demand and unless "the buyer has failed to comply with such demand."[34]

[127] In *Weinbren v Michaelides*,[35] the seller, in purporting to comply with the provisions of section 12(b) of the 1942 Act, as it stood prior to the 1965 amendment, had

[34] The difference between the 1965 amendment of section 12(b) of the Hire-Purchase Act of 1942 and section 12(b) prior to that amendment, in so far as it is relevant to the present matter, was that the amended section 12(b) made it clear beyond any doubt that the purchaser had to hand the letter over to the buyer. Such words were absent in the pre-1965 provision.

[35] 1957 (1) SA 650 (WLD).

addressed a letter to the purchaser and sent it by registered post to the latter's last known address. The letter never reached the purchaser. It was returned by the Post Office to the seller with the note "gone away". In that case the Court expressed the view that prima facie section 12(b) meant that the demand in writing had to reach the buyer.[36] The Court said:

> "Now, I think it is clear and Mr *Merber* does not contend to the contrary – that *prima facie* the demand which must be made in writing under section 12(b) must reach the buyer. The Legislature has given him ten days after the demand in which to comply with the demand and that means, I think, that the demand to be effective must be a demand which has reached the buyer."

I am in agreement with this view.

[128] In section 12(b), before the 1965 amendment, what was required of the seller before he was allowed to proceed was that he should have "made written demand to the buyer to carry out the obligation in question . . . and the buyer [had] failed to comply with such demand." What is required of the credit provider in section 129(1)(a) and (b) of the NCA is to "draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor" with the required intent. If the Court in *Weinbren* was right in holding that, on that wording of the 1942 Act, the Legislature intended that the demand in writing should reach the buyer, I cannot see how it can be said, on the above wording of section 129(1)(a), that the Legislature did not

[36] Id at 651A.

intend that the letter, which draws the default to the notice of the consumer and which contains the credit provider's proposal about what should be done to resolve the problem, need not reach the consumer.

[129] An argument was advanced on behalf of the seller in *Weinbren*'s case that, by reason of a clause in the agreement between the parties, the parties had agreed that "any written notice to be given to the buyer shall be sufficiently delivered if sent by post to the residential or business address of the buyer last known to the seller" and the fact that the seller had posted the letter or notice to the buyer's last known address meant that the seller had complied with section 12(b) of the 1942 Act. The Court rejected this argument.

[130] One of the bases upon which the Court rejected the argument was that, if upheld, it would mean that—

> "a perfectly honest buyer might change his address and might use the statutory right which is given to him of giving a fortnight's notice of that change, using the fortnight after he had changed his address within which to give his notice and during that period a letter demanding that he carry out his obligations might be delivered to his old address."[37]

The Court said that in such a case, an honest buyer would be deprived of his statutory right to be given the section 12(b) opportunity to purge the default before the seller could institute legal proceedings against him. For this and other reasons, the Court rejected the

[37] Id at 652A.

proposition that there was compliance with section 12(b) if a letter that had been sent by registered post to the buyer had not reached him.

[131] It is now necessary to refer to and consider the provision of section 13(1) of the Sale of Land on Instalments Act[38] (1971 Act), and how it was interpreted by our courts. Section 13(1) read as follows:

> "No seller shall, by reason of any failure on the part of the purchaser to fulfil an obligation under the contract, be entitled to terminate the contract or to institute an action for damages, unless he has by letter handed over to the purchaser and for which an acknowledgement of receipt has been obtained, or sent by registered post to him at his last known residential or business address, informed the purchaser of the failure in question and made demand to the purchaser to carry out the obligation in question within a period stated in such demand, not being less than thirty days, and the purchaser has failed to comply with such demand."

[132] I draw special attention to the fact that what section 13(1) required of the seller when the purchaser had failed to fulfil an obligation under the contract was that the seller must inform the purchaser of the failure in question and demand that the purchaser carry out the obligation within a period specified in the letter. The seller was to do this "by letter handed over to the purchaser . . . or sent by registered post to him at his last known residential or business address". Under section 13(1) the obligation had to be carried out within a period stated in the letter. Under section 129(1)(a) of the NCA read with section 130(1)(a) no court proceedings may be instituted until at least 10 business days have

[38] Act 72 of 1971.

elapsed since compliance with section 129(1). Under section 13(1) the termination of the agreement or the institution of court proceedings was precluded until certain conditions had been met. Under sections 123 and 130(1)(a) of the NCA the termination of an agreement and the institution of legal proceedings are also precluded until certain conditions have been met. When one compares the wording of section 12(b) of the 1942 Act and the wording of section 13(1) of the 1971 Act, it becomes immediately clear that, to a very large extent, the two provisions are identical. When section 13(1) is compared with section 129(1)(a), read with sections 123 and 130(1)(a), it is clear that the two sections share some similar features.

[133] There can be no doubt that both sections 12(b) and 13(1) sought to address the same problem, namely, the procedure to be followed and the conditions that had to be met before the seller could act in one way or another when the buyer was in breach of the agreement between the parties. There can also be no doubt that under both provisions, the seller was required to bring the breach or default to the notice of the buyer or purchaser in writing, and had to afford the buyer a period of at least 10 days to enable the latter to remedy the breach or bring the payments up to date before he could institute legal proceedings or before he could terminate the agreement. It must be noted that those features, which were present in sections 12(b) and 13(1), are also present in section 129(1)(a) and (b) read with section 130(1). I now consider how the courts interpreted section 13(1) of the 1971 Act.

[134] In *Maharaj v Tongaat Development Corporation (Pty) Ltd*[39] (*Maharaj*) there was a dispute between the parties about whether the purported cancellation of a contract of sale of land was valid. This depended on whether the period prescribed in section 13(1) of the 1971 Act began to run from the time the letter was received by the purchaser. The Appellate Division said:

> "It is to be noted that section 13(1) of Act 72 of 1971 postulates two alternative methods of informing the purchaser of any default on his part and demanding that it be remedied within the period stated in the letter (being not less than 30 days):
>
> (a) by handing the letter over to the purchaser and obtaining an acknowledgement of receipt therefor; or
>
> (b) by sending it by registered post to the purchaser at his last known residential or business address."[40]

[135] The Court stated in *Maharaj* that it was in agreement with Galgut J's view expressed in *Maron v Mulbarton Gardens (Pty) Ltd*[41] that the seller is entitled to choose any one of the two alternative methods.[42] The Court also said in *Maharaj*:

> "It is to be noted that the first-mentioned method contemplates a handing over of the letter to the purchaser himself. Although the seller may no doubt cause the handing over to be effected by his agent or servant, it is, in my opinion, clear that the handing over, in order to be effective, must be to the purchaser and to nobody else."[43] (Underlining added.)

---

[39] 1976 (4) SA 994 (A).

[40] Id at 999H-1000A.

[41] 1975 (4) SA 123 (W) at 125 B-C.

[42] *Maharaj* above n 39 at 1000A-B.

[43] Id at 1000B.

The Court pointed out that it was clear from the first method of handing over that the Legislature intended that the purchaser should be informed personally of the alleged default and should, moreover, be accorded the full benefit of the period within which he was required to remedy the default.[44] The Court said this in respect of a case where the first method of handing over was used. It went on to say the following in respect of sending a letter by registered mail:

> "In providing for an alternative method, the Legislature no doubt contemplated the possibility that a handing over to the purchaser might not always be possible or convenient. The question arises whether, in prescribing (for the convenience of the seller) an alternative method of informing the purchaser by letter of an alleged default, the Legislature contemplated any lesser measure of protection for the purchaser than that inherent in the employment of the first-mentioned method? For the reasons which follow, I am of the opinion that the question must be answered in the negative".[45] (Underlining added.)

[136] The Appellate Division gave seven reasons why it held that the provision of section 13(1), which allowed the seller to send the notice to the purchaser by registered post to his last known residential or business address, required that the letter should reach the purchaser. The Court's reasons were that:

(a) In enacting section 13(1) the overall intention of the Legislature was to afford reasonable protection to a purchaser who, by reason of a failure by

[44] Id at 1000H.

[45] Id at 1000H-1001A.

him to fulfil an obligation under a contract, faces a threat by the seller to terminate the agreement or to institute an action for damages.

(b) In prescribing that the seller could send the letter by registered post, the Legislature no doubt accepted that that method is almost invariably employed where important letters or other documents are sent to an addressee through the post. Whilst registered letters no doubt do go astray, there is, at least, a high degree of probability that most of them are delivered.

(c) The date of posting and the date of delivery can readily be established.

(d) Section 13(1) requires that the letter be sent to the purchaser "at his last known residential or business address", which would not necessarily be the same as the address which, in terms of the contract, serves as *domicilium citandi et executandi* for all purposes of the contract. The learned Judge went on to say that

> "[t]his, in my opinion, is an indication that the Legislature intended, as in the case of the first-mentioned method, that the letter should reach the purchaser or, at least, be made available to him at an address where he is likely to be placed in possession thereof. If the question of delivery of the letter were to be in issue, I am of the opinion that evidence that it was delivered at the specified address would constitute *prima facie* proof of the delivery of the letter to the addressee (the purchaser)." [46]

[46] Id at 1001D.

(e) If the letter was not delivered to the addressee (the purchaser) the letter would be returned to the seller and he would know that "his method of delivery was ill-chosen." [47]

(f) If the period of 30 days began to run from the date of posting, "an element of uncertainty, affecting the purchaser's protection" [48] would be introduced. The Court went on to say:

> "The date of the letter would not necessarily be a reliable guide as to the date of posting. This difficulty arose in the present case. It was suggested that the postmark would proclaim the date of posting. As to that, one knows from experience that postmarks are not always clearly decipherable . . . It is obviously important for a defaulting purchaser to know with certainty within what time the default is to be remedied by him. He would ordinarily have certainty if the period mentioned in the letter begins to run from the date of delivery thereof to him."[49]

(g) "It is always open to a seller to take steps to verify whether delivery has been effected and, if it has, the date thereof. He, too, would then know when the period mentioned in the letter expires."[50]

[137] In conclusion the Court said:

[47] Id at 1001D-E.

[48] Id at 1001E-F.

[49] Id at 1001E-G.

[50] Id at 1001G.

> "For these reasons, I am satisfied that, upon the proper construction of section 13(1), the period mentioned in the letter (being not less than 30 days) begins to run from the date on which it is received by the purchaser."[51]

In *Phone-A-Copy Worldwide (Pty) Ltd v Orkin and Another*[52] the Appellate Division followed its decision in *Maharaj*.

The meaning of delivery

[138] *A to Z Bazaars (Pty) Ltd v Minister of Agriculture*[53] (*A to Z*) is a case in which the Appellate Division dealt definitively with what the ordinary meaning of the word "deliver" or "delivered" is. In response to an expropriation notice from the Minister of Agriculture in which A to Z Bazaars (Pty) Ltd (A to Z) was offered a certain amount of compensation, A to Z posted a letter to the Minister accepting the compensation offered. However, before that letter could reach the Minister, A to Z sent a telegram to the Minister withdrawing its acceptance of the compensation offered by the Minister. The question for decision was whether or not, when A to Z posted the letter of acceptance of the Minister's offer, a contract came about between the parties even before the letter of acceptance reached the Minister, or whether no contract came into being then and, therefore, A to Z's telegram withdrawing the acceptance, which was received by the Minister, was effective.

[51] Id at 1001G-H.

[52] 1986 (1) SA 722 (A).

[53] 1975 (3) SA 468 (A).

[139] The Minister took a view that accorded with cases such as *Cape Explosives*[54] where it was held that, when a written offer is made by letter sent through the post, a contract comes into being, in the absence of the expression of a different intention by the offeror, on the posting by the offeree of the letter of acceptance. A to Z maintained that a contract would only have come into being in that case once the letter of acceptance had been received by the Minister.

[140] The answer depended on the construction of section 6(1) of the Expropriation Act.[55] As far as it is relevant for present purposes, section 6(1) of the Expropriation Act read:

> "(1) An owner whose property has been expropriated in terms of section two shall within thirty days (or such longer period as the Minister may in writing allow) from the date of notice in question deliver or cause to be delivered to the Minister—
>
> (a) a written statement indicating—
>
> (i) if any compensation was offered for such property, whether or not he accepts that compensation and, if he does not accept it, the amount claimed by him as compensation; or
>
> (ii) if no such compensation was offered, the amount claimed by him as compensation;
>
> (b) if such property is immovable property, his title deed thereof, if it is in his possession or under his control".

[54] *Cape Explosives Works, Ltd v South African Oil and Fat Industries, Ltd; Cape Explosives Works, Ltd v Lever Brothers (South Africa), Ltd* 1921 CPD 244 at 266.

[55] Act 55 of 1965.

[141] The Appellate Division held that the principle expounded in *Cape Explosives* did not apply to the *A to Z* case because section 6(1) required A to Z to "deliver or cause to be delivered to the Minister" a statement indicating whether it had accepted or rejected the compensation offered. The approach adopted by the Appellate Division was to give the word "deliver" or the phrase "cause to be delivered" its ordinary meaning. The Appellate Division held that the ordinary meaning of the verb "deliver" is "to hand over, transfer, commit to another's possession or keeping".[56] The Court rejected a contention by the Minister to the effect that the word "deliver" or the phrase "cause to be delivered" in section 6(1) had to be read to include "post or cause to be posted".[57] The Court said:

> "'Deliver or cause to be delivered' does not relate only to an acceptance of the offer - if there is no acceptance, the offeree must 'deliver or cause to be delivered' a statement that he does not accept, setting out the amount claimed by him as compensation. A mere posting of such a statement, which never reaches the offeror, could hardly be considered to constitute compliance with this provision."[58] (Underlining added.)

[142] The Court went on to say:

> "The words 'in accordance with the provisions of section 6(1) of the aforesaid Act' in paragraph 4 of the notice of expropriation, therefore, import the condition that acceptance of the offer is to be effected by 'delivery' (in the sense explained above) of a written acceptance. The appending of a postal address to the notice does not alter this. It only means that 'delivery' may there be effected. The post may be used, but only when the

[56] *A to Z* above n 53 at 477B.

[57] Id at 477A-B.

[58] Id.

statement actually reaches 'P.O. Box 2648, Pretoria', is the delivery completed."[59] (Underlining added.)

[143] The Court also said:

"On a true construction the word 'deliver' in section 6 does not include mere posting. But, even if it did, section 7 of the Interpretation Act, 33 of 1957, would appear to operate against the respondent:

> 'Where any law authorizes or requires any documents to be served by post, whether the expression 'serve', or 'give', or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a registered letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

It emerges clearly that the service is only effective from the date of actual delivery. Normally this is deemed to be

> 'the time at which the letter would be delivered in the ordinary course of post',

but the contrary may be proved. If it is established that the letter never reached its destination, the service never becomes effective. The service is inchoate until actual delivery. It seems to follow that, if before that time another communication arrives, neutralising the first, it should prevail."[60] (Underlining added.)

[59] Id at 477G-H.

[60] Id at 477H-478B.

[144] In conclusion the Court said: "Moreover, if the expropriatee adopts the post as a means for the conveyance of the title deed or above-mentioned particulars to the Minister, he assumes the risk that it may go astray".[61] Another case which dealt with the ordinary meaning of the word "deliver" is *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd*[62] but it simply referred to the *A to Z* decision.

[145] In my view the use of the word "delivered" in section 130(1)(a) does not present any problem whatsoever if it is properly construed. To construe it properly, I think it must be interpreted in the light of section 129(1)(a) not, as suggested in the main judgment, that section 129(1)(a) must be interpreted in the light of section 130. However, we must give the word "delivered" in section 130(1) its ordinary meaning as explained in the *A to Z* case. If the word "delivered" in section 130(1)(a) is given its ordinary meaning, then it contemplates that the section 129(1)(a) letter or notice would be handed over to the consumer or would be transferred to the possession of the consumer or to his keeping. That is more consistent with the requirement of section 129(1)(a) that the credit provider has to draw the default to the notice of the consumer.

[61] Id at 478F.

[62] 1984 (3) SA 834 (W).

The proper interpretation of section 129(1)(a)

[146] Purposive construction must be used in construing section 129(1)(a). This is required by section 2(1) of the NCA.[63]

[147] The purposes of the NCA[64] 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, by, among other things—

(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;

(b) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

(c) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

(d) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(e) "providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual

[63] Section 2(1) of the NCA reads: "This Act must be interpreted in a manner that gives effect to the purposes set out in section 3."

[64] Section 3 of the NCA.

satisfaction of all responsible consumer obligations under credit agreements."[65] (Underlining added.)

[148] Section 15(a) of the NCA is also significant. It enjoins the National Credit Regulator (NCR) to enforce the NCA by "promoting informal resolution of disputes arising in terms of this Act between consumers on the one hand and a credit provider or credit bureau on the other, without intervening in or adjudicating any such dispute".

[149] If a credit provider does not intend to terminate a credit agreement before the time provided for in the agreement owing to the consumer being in default of payment or does not intend to commence legal proceedings to enforce the agreement, it is not obliged to take the steps contemplated in section 129(1)(a). However, the effect of section 129(1)(a) and (b) read with section 123(1) and (2)[66] is that a credit provider may not terminate a credit agreement as a result of the consumer's default in payments without first drawing the default to the consumer's notice in writing and proposing to him that he refer the credit agreement to a debt counsellor with the intent referred to in section 129(1)(a).

[65] Section 3(i) of the NCA.

[66] Section 123 reads in relevant part:

"**Termination of agreement by credit provider**

(1) A credit provider may terminate a credit agreement before the time provided in that agreement only in accordance with this section.

(2) If a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to enforce and terminate that agreement."

[150] In terms of section 129(1)(a) either the drawing of the default to the notice of the consumer, the referral of the credit agreement by the consumer to a debt counsellor, or both, need to be done "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". This suggests that the overall objective of the two steps to which reference is made in section 129(1)(a) is to enable the two parties to "resolve any dispute under the agreement" if there is a dispute or to "develop and agree on a plan to bring the payments under the agreement up to date". That is why section 129(1)(a) requires that there be "the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under agreement up to date".

[151] It is implied in the proposal and the referral provided for in section 129(1)(a) that both parties must endeavour to resolve any dispute under the agreement that may exist between them or develop and agree on a plan to bring the payments up to date. Such a duty gives effect to the purpose provided for in section 3(i) relating to the provision of a system of debt restructuring and enforcement "which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements." If there was no such obligation on the parties, the provisions of section 129(1)(a) would have very little value.

[152] Section 129(1)(b) precludes the credit provider, subject to section 130(2), from commencing any legal proceedings to enforce a credit agreement unless two conditions are met. The one is "first providing notice to the consumer, as contemplated in [section 129(1)(a)], or in section 86(10), as the case may be".[67] The other is meeting any further requirements set out in section 130.[68] Section 130(2) has no application to the present case.

[153] I draw attention to the following:

(a) Section 129(1)(a) makes it clear that the default must be drawn "to the notice of the consumer"; it does not say that the credit provider must address a letter to the consumer and send it to his address. In this regard it is plain that the section requires the credit provider to draw the default to the attention of the consumer.

(b) Section 129(1)(a) requires that, in referring the credit agreement to a debt counsellor, the consumer must do so "with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan". This requirement can only be met if the consumer has received the section 129(1)(a) letter. There can be no such intent on the part of the consumer when he has not become aware of the contents of a section 129(1)(a) letter. He cannot participate in the resolution of any dispute under the agreement

[67] Section 129(1)(b).

[68] Section 130 is set out in para [44] of the main judgment.

if he is not aware of the default and of the credit provider's proposal nor can he develop and agree with the credit provider on a plan to bring the payments under agreement up to date if he is not aware of the contents of the section 129(1)(a) letter.

(c) If it is said, as it is in the main judgment, that section 129(1)(a) is complied with if the section 129(1)(a) letter has reached the consumer's local post office even if it has not reached him or his address, the consumer will also not know the date when the letter reached the local post office and, therefore, will not know from what date he must calculate the 10 business day period referred to in section 130(1)(a) within which he must convey his reply to the credit provider.

(d) Section 129(1)(b) is clear: it is "to the consumer" that the section 129(1)(a) notice must be provided. It precludes the commencement of legal proceedings by the credit provider to enforce the agreement "before first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be". (Underlining added.) To provide something seems to me to involve handing something over to that person.

[154] Section 130(1) also needs to be considered. It reads:

> "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 in that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals". (Underlining added.)

[155] It will be recalled that in the main judgment, as well as in *Rossouw*[69] and certain judgments of the different High Courts that preceded *Rossouw*, the use of the word "delivered" in section 130(1)(a) was heavily relied upon to support the proposition that section 129(1)(a) does not entail that the consumer must receive the section 129(1)(a) letter or must be aware of the contents of that letter. It seems to me, as I say elsewhere in this judgment, that the reliance upon the word "delivered" in section 130(1)(a) to advance that proposition is misplaced.

[156] There are a number of High Court decisions on what compliance with section 129(1)(a) entails which preceded *Rossouw*. Some, like *Munien*,[70] *Mellet*,[71] *Rockhill*[72] and *Starita*[73] were to the effect that the mere dispatch of a section 129(1)(a) letter constitutes compliance with section 129(1)(a) by the credit provider. Others, like *Dhlamini*[74] and

[69] *Rossouw and Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA).

[70] *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD) at para 14.

[71] *Standard Bank of South Africa Ltd v Mellet and Another* [2009] ZAFSHC 110 at para 11.

[72] *Standard Bank of South Africa Ltd v Rockhill and Another* 2010 (5) SA 252 (GSJ) at para 5.

[73] *Starita v ABSA Bank Ltd and Another* 2010 (3) SA 443 (GSJ) at para 18.6.

[74] *Firstrand Bank Ltd v Dhlamini* 2010 (4) SA 531 (GNP) at paras 27-8.

Prochaska[75] were to the effect that section 129(1)(a) is complied with when the default is drawn to the attention of the consumer and the credit provider's section 129(1)(a) proposal is made to him. It is not necessary to discuss all of those decisions. It suffices to say that most, if not all, of the decisions that took the view reflected in *Rossouw* failed to focus on the real question that must be asked in order to determine whether section 129(1)(a) has been complied with. In the light of the wording of section 129(1)(a) that question is: did the credit provider draw the default to the notice of the consumer and propose that he refer the credit agreement to a debt counsellor with the intent contemplated in section 129(1)(a)? If the answer to this question is yes, there has been compliance. If the answer is no, there has been no compliance. If an attempt was made to draw the default to the notice of the consumer but it was not successful, it remains an unsuccessful attempt. The decisions which took the view reflected in *Rossouw* unduly focussed on the word "delivered" in section 130(1)(a), to the detriment of section 129(1)(a) and failed to give that word its ordinary meaning.

[157] Furthermore, the word "delivered" in section 130(1)(a) is qualified by the words "as contemplated in . . . section 129(1)(a)". That means that one must first establish what section 129(1)(a) means and then understand the word "delivered" in section 130(1)(a) within the context of the meaning of section 129(1)(a). Therefore, to the extent that the word "delivered" may have different meanings, one has to choose a meaning that is as close as possible to the meaning of section 129(1)(a). One ought not attach to the word

[75] *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D&CLD) at para 55.

"delivered" a meaning which is inconsistent with section 129(1)(a) or which is at variance with the meaning of section 129(1)(a). Although I have said what I have just said about the meaning to be attached to the word "delivered" in section 130(1)(a), strictly speaking, anyone construing the word "delivered" in section 130(1)(a), does not need to go that far. All one needs to do is to give the word "delivered" in section 130(1)(a) its ordinary meaning as explained by the Appellate Division in the *A to Z* case to which I have already referred. That is "to hand over, transfer, commit to another's possession or keeping".[76] That meaning is in line with the ordinary meaning of the notion of drawing something to someone's notice.

[158] If the position was that, as was held in *Rossouw*, the dispatch of a section 129(1)(a) letter by the credit provider complies with section 129(1)(a), even if it does not reach the consumer, the calculation of the period of 10 business days to which reference is made in section 130(1)(a) would commence on the day after the day on which the credit provider dispatched the letter to the consumer. This would mean that, if the letter took five days to reach the consumer's address, the consumer would by then be left with half that period of 10 business days to seek to either bring the payments up to date or respond to the credit provider's proposal. The result would be that the consumer is denied the benefit of the full 10 business days provided for in section 130(1)(a) of the NCA. This cannot be right. The same applies if the main judgment's interpretation is adopted. The time would begin to run from the day after the day on which the letter reached the consumer's local post

[76] See above n 53.

office and not when the consumer received the section 129(1)(a) letter. The consumer would stand to suffer more hardship or prejudice if section 129(1)(a) were given that interpretation than the hardship or prejudice which the credit provider stands to suffer if section 129(1)(a) is given the construction I propose in this judgment.

[159] In my view the Legislature could never have provided, as it did in section 130(1)(a), that the credit provider may not approach the court to enforce a credit agreement against a consumer, unless at least 10 business days have elapsed since the credit provider delivered the section 129(1)(a) letter to the consumer, if the intention was that the period of 10 business days afforded to the consumer has to be calculated from the day of the dispatch of such letter or from the day the letter arrived at the post office closest to the consumer. The Legislature could never have intended such a consequence because it would have been aware that in the end the consumer would not have 10 business days within which to convey his reply to the credit provider. I am, therefore, of the opinion that the 10 business days to which reference is made in section 130(1)(a) is 10 business days from the date of receipt by the consumer of the section 129(1)(a) letter.

[160] Finally, the proposition that the credit provider has drawn the default to the notice of the consumer if the section 129(1)(a) letter has gone as far as the consumer's local post office disadvantages a very significant section of the population of South Africa. That is that part of the population which lives in areas where the postal authorities do not deliver the post to people's residences or where many households do not have access to the use

of postal boxes provided by post offices. Most of the people to whom I refer in this regard live in rural areas or on farms belonging to their employers and in some townships. Some of the people in rural areas depend on the local school to receive their mail. In such cases people use the local shop or the postal address of the local school. The owner of the shop or the principal of the local school fetches the mail from the nearest post office and brings it to his shop or the school, as the case may be, and the local people get it from there or other people would take their friends' letters or their neighbours' letters when they find them at the store or at the school.

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

[162] The considerations to which I make reference above with regard to black people living in rural areas and in some townships fortify me in the view that, when section 129(1)(a) requires the credit provider to "draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor . . .", it means that the credit provider must inform the consumer of the default and make the proposal contemplated in section 129(1)(a) to him. On this construction of

section 129(1)(a) the period of 10 business days to which reference is made in section 130(1)(a) does not start running while the section 129(1)(a) letter is on its way to the consumer but it starts to run when the consumer is informed of the default and learns of the credit provider's proposal that he refer the credit agreement to a debt counselor.

[163] Section 130(3)(a) 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—
>
> (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with". (Underlining added.)

From this it is clear that the Legislature regards the section 129 procedure as so important that it decided to preclude a court from dealing with a matter relating to a credit agreement until it has first satisfied itself that the section 129(1)(a) procedure has been complied with.

[164] Section 130(4) provides:

> "In any proceedings contemplated in this section, if the court determines that—
>
> (a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;
>
> (b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection 3(a), or has approached the court in circumstances contemplated in subsection 3(c), 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".[77]

Once again it seems to me that this provision is indicative of how seriously the Legislature takes the provisions of section 129(1)(a). It regards them as so important that, if a court determines that the credit provider has not complied with them, it would be obliged not to proceed with the matter but to adjourn the matter and make an order specifying the steps that the credit provider must complete before the matter may be resumed in court.

[165] If compliance with section 129(1)(a) means that the consumer must be made aware of the fact of his default and of the credit provider's proposal, the steps the court could specify in its order to ensure that the consumer personally receives the section 129(1)(a) letter could be any one or more of the following:

(a) the credit provider sends another section 129(1)(a) letter by registered mail.

(b) the credit provider gives the section 129(1)(a) letter to the sheriff to serve on the consumer personally.

(c) the credit provider sends an employee or agent to visit the consumer's residential address or workplace and personally give him the section 129(1)(a) letter.

[77] The section 83 order a court is expected to make, after it makes a section 80 finding that a credit agreement was reckless, depends on why the credit agreement was reckless.

(d) the credit provider sends the section 129 (1) (a) letter to the consumer by courier.

(e) the credit provider sends the 129(1)(a) notice by email.

It would be understandable if the Court would take the trouble to specify these steps as the steps that the credit provider must complete before the matter can be resumed in court because these steps would enhance the possibility that the consumer becomes aware of his default and of the credit provider's proposal that he refer the credit agreement to a debt counsellor.

[166] Section 96 reads:

"**Address for notice**

(1) Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the 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).

(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." (Underlining added.)

[167] The question that arises is whether a section 129(1)(a) letter or notice is a "legal notice" that a party to a credit agreement is required to or may wish to give to the other

party to the agreement for any purpose contemplated in the Act. In my view, the answer is, without a doubt, a yes. That means that section 96 applies in a case such as the present one. Section 96(1) enjoins the party who is required to give a legal notice or who wishes to give notice to "deliver that notice to the other party" and specifies even where the delivery must take place. I say it enjoins the party seeking to or required to give such notice because it says "must deliver that notice to the other party". Once one accepts that a section 129(1)(a) letter is a legal notice as contemplated in section 96(1), then one must give the word "deliver" in section 96(1) its ordinary meaning as reflected in the *A to Z* case above.[78]

[168] The language of section 96 is clear. The section says that the notice must be delivered "to the other party". That leaves no room for the proposition that a notice that is not delivered to such party is good enough. Furthermore, if one then gives the word "deliver" in section 96(1) its ordinary meaning of handing over or transferring something to the possession or keeping of another, quite clearly that proposition is inconsistent with the notion that a letter which is stuck at the consumer's local post office has been delivered to him or its contents have been drawn to his notice.

[169] Section 96(1) also makes it clear where the delivery of the legal notice must take place. It says "at . . . the address of that other party as set out in the agreement, unless paragraph (b) applies". That means that there are only two addresses at which a legal

[78] See above [138]-[145].

notice as contemplated in section 96(1) and, therefore, a section 129(1)(a) letter, may be delivered, if the requirements of section 96(1) are to be complied with. It is either at the other party's (in this case the consumer's) address as given in the credit agreement or at the address most recently provided by the recipient in accordance with section 96(2). That means either an address provided by a party to a credit agreement when he or she changes to a new address different from the one provided in the credit agreement. For an address to come within the provision of section 96(2) it must have been delivered in writing to the party seeking to give legal notice by hand, registered mail, or electronic mail, if the party seeking to give the legal notice has provided an email address.

[170] Section 168 must also be considered. It reads:

> "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."

[171] The provisions of section 168 are consistent with the provisions of section 96 as set out above. Whereas the provisions of section 96 govern the giving of a legal notice for purposes of the NCA or a credit agreement, the provisions of section 168 govern the service of notices, orders or other documents in terms of the NCA. Both section 96(1) and section 168(1)(a) contemplate delivery "to the other party" or delivery "to that person". Both section 96(2) and section 168(1)(b) provide alternative methods of

delivery to the other party at the address given in the credit agreement. Both section 96 and section 168 appear to be inconsistent with the notion that a letter or notice that ends at the consumer's local post office would be sufficient for purposes of section 96 and section 168. If a letter, order or notice that ends at the consumer's local post office would not be sufficient for purposes of section 96 and section 168, why would it be sufficient for purposes of section 129(1)(a)?

[172] Section 168 recognises only two forms of service as proper service on a person under the NCA. They are where the notice, order or other document is "delivered to that person" and where it is "sent by registered mail to that person's last known address". The first-mentioned manner of service presents no difficulty. The question that may be asked with regard to the second-mentioned manner of service is: to what scenario does the second-mentioned manner of service apply?

[173] The answer has to be that it applies to a situation where the consumer's current whereabouts are not known to the credit provider. That is why section 168(b) says that the address to which the notice, order or document must be sent by registered post is his last known address. This means that, if a notice is sent by registered mail to the address that a consumer gave to the credit provider in the credit agreement as his *domicilium citandi et executandi*, that service will not be proper service where the notice is returned from that address as unclaimed and the credit provider is aware of another address as the consumer's last known address. In such a case the credit provider would be obliged to

send the letter by registered mail to the consumer's last known address even if that address is not the one given in the credit agreement as his *domicilium citandi et executandi*.

[174] The Legislature was so keen that the notices, documents, or orders that must be served on parties to credit agreements should come to the relevant person's personal attention that it enacted section 168(b) requiring that the notice be sent to a person's last known address rather than to the address given in the credit agreement. Section 168(b) supports the proposition that a section 129(1)(a) letter must be received by the consumer and it is no compliance with section 129(1)(a) if it goes only as far as the consumer's local post office.

Conclusion

[175] The construction that the NCA does not ordinarily require that the default and the proposal to which reference is made in section 129(1)(a) be conveyed to the consumer—

(a) is textually inconsistent with the words "draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor . . ." in section 129(1)(a);

(b) is inconsistent with most of what the NCA seeks to do in order to advance its purposes as set out in section 3;

(c) ignores the fact that section 129(1)(a) was enacted primarily for the benefit and protection of the consumer;

(d) places the consumer in a more disadvantageous position in relation to the credit provider than he was at common law;

(e) does not advance even the credit provider's interests in the long term even though it may advance them in the short term; and

(f) has the effect of reading into the NCA a deeming provision to the following effect: when a section 129(1)(a) letter, addressed to a consumer and sent by registered post, has reached the consumer's local post office, the consumer is deemed to have received it. This is done even though the NCA has no such deeming provision.

[176] In my view, the construction of section 129(1)(a), which entails that the credit provider must make the consumer aware of the default and of the proposal contemplated in section 129(1)(a), accords with the language of the provision, is fair, gives effect to the purpose of section 129(1)(a) and gives appropriate weight to the Legislature's intention to make cancellation and judicial enforcement of credit agreements measures of last resort that must be resorted to when the dispute resolution mechanisms prescribed by the NCA have been exhausted and the consumer has been afforded an opportunity to avoid such steps.

[177] For the above reasons, I would uphold the appeal and make the order proposed in the main judgment.

For the First Respondent:	Advocate CDA Loxton SC and Advocate JA Cassette instructed by Norton Rose South Africa (incorporated as Deneys Reitz Inc).
For the First Amicus Curiae:	Advocate S Wilson and Advocate I De Vos instructed by the Socio-Economic Rights Institute of South Africa Law Clinic.
For the Second Amicus Curiae:	Advocate M Chaskalson SC and Advocate D Smit instructed by Webber Wentzel.
For the Third Amicus Curiae:	Advocate G Marcus SC and Advocate N Ferreira instructed by Bham and Dahya.