

RISKS AND PECULARITIES OF THE DEFAULT SITUATIONS IN BANK-CONSUMER RELATIONSHIP: A CASE STUDY

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Abstract

Kubyana and Standard Bank of South Africa, this matter was brought before the North Gauteng High Court sitting in Pretoria, South Africa. The issue to be determined by the Court was to look at the steps that the credit provider ought to take in order to ensure that a notice, notifying the debtor about his/her debt reaches him/her as a consumer before such notice could commence court litigation. This can only happen, in the circumstances where he/she (the defaulter/consumer) failed to comply with his/her obligation. The North Gauteng High Court was required to decide the legal requirements that may be brought in to satisfy the court on preponderance of evidence that the credit provider has satisfied the court that the defaulter or consumer received such notice.

Keywords: Default Situation, Section 129 Notice, Credit Provider, Consumer, Credit Agreement and National Credit Act

1. INTRODUCTION

According to section 129(1)(a) of the South African National Credit Act 34 of 2005 (hereafter called 'NCA') if a consumer is in default under a credit agreement, the credit provider should inform the consumer in writing of the default. And thereafter propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution, consumer court or ombud having necessary jurisdiction to hear the matter. The aim is to have the parties resolve any dispute in terms of the agreement. The parties may alternatively develop and agree on a plan in order to bring the payments under the agreement up to date. The purpose of section 129 is first, to bring the default to the attention of the consumer. Second, to propose that the consumer seeks the assistance of a debt counsellor. And third, to develop a plan that will bring the payments under the agreement up to date, these requirements were alluded to by the Court in *Standard Bank of South Africa v Maharaj* 2010 (5) SA 518 (KZP) 520, and also confirmed by the Van Heerden and Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 TSAR 655 658-668, this article further discusses of section 129 and the methods of delivery of notice in terms of section 129. More pertinently section 32(c) of the National Credit Amendment Act 19 of 2014. This section came into operation on 13 March 2015. The section added the provision in section 129 that the notice in terms of section 129(1)(a) must be delivered by registered mail or to an adult person at the place designated by the consumer (section 129(5)). The consumer is also required in writing to indicate the

method of delivery that he/she prefers (section 129(6)). The written confirmation by the postal service or authorised agent of the post office or postal agency or his/her signature or his/her identifiable mark will constitute proof of delivery (section 129(7)).

Section 96(1) of the NCA also provides that a party wishing to deliver a notice under the NCA should use the address that is indicated in the credit agreement or the address that was recently given by the recipient subject to section 96(2) (see the discussion on section 96(1) by Van Heerden in Scholtz (eds) *Guide to the National Credit Act* (2008) para 12.4.5; it was also discussed by Louw, *Consumer Credit Regulation in South Africa* (2012) 419-434).

In the matter between *Kubyana v Standard Bank of South Africa* 2014 (3) SA 56 (CC) 57H the Constitutional Court had to decide which steps the credit provider should take in order to ensure that a section 129 notice reaches a consumer before the credit provider commences litigation, and what the credit provider should do in order to satisfy the court that it has discharged its obligation to effect proper delivery of a statutory notice. This case came before the Constitutional Court as an appeal from a ruling of the North Gauteng High Court. The aim and purpose of this research is to investigate and analyse the decision in *Kubyana v Standard Bank*. This research investigates whether a consumer who elected to receive a section 129 notice by registered mail and thereafter fails to collect the said registered item from the Post Office, after he (consumer) received a notification from the Post Office. The question is, can such a consumer escape

liability? Brief reference would also be made to the National Credit Amendment Act 19 of 2014 which added further provisions to tighten the procedure for delivery of notices in terms of section 129.

2. THE PURPOSE OF THE RESEARCH PAPER

The South African National Credit Act, 34 of 2005 requires the credit provider to apply a means test before advancing a credit to a consumer, however if there is a dispute between the parties, the parties must resolve the disputes in terms of the credit agreement. Section 129(1)(a) of Act 34 of 2005 provides that if a consumer is in default under a credit agreement, the credit provider should inform the consumer in writing of the default. The issue that was raised in various courts, was the validity of the delivery of section 29(1)(a) notice that informs the consumer about his/her default payments. The paper endeavours to clarify through case law the validity and delivery of section 29(1)(a) notice.

3. RESEARCH METHODOLOGY

This research has adopted doctrinal legal research approach as a data collection method. This method is also known as the "black letter law". Pearce, Cambell and Harding define doctrinal legal research approach as a research which provides a systematic exposition of the rules governing a particular legal category, analysis of the relationship between rules and explains areas of difficult and perhaps predicts future developments. Therefore, doctrinal method basically means reading, interpreting and analysing of legal resource in details.

4. THE FACTS OF KUBYANA V STANDARD BANK OF SOUTH AFRICA

In November 2007 Mr Kubyana and Standard Bank entered into an agreement for the purchase of a motor vehicle. The agreement between Standard Bank and Mr Kubyana was regulated by the NCA. According to the aforesaid agreement Mr Kubyana had to pay instalments in the amount of R2 501,25 over 60 months. He appointed an address as his *domicilium citandi et executandi* at which he will receive notices and correspondence from Standard Bank (par [2]). He later fell into arrears regarding the payment of his car note. It happened on several occasions between the period of October 2008 and July 2010. Standard Bank tried to bring this issue to his attention by contacting him telephonically on several occasions. Mr Kubyana kept on promising to settle his outstanding debt arrears. Standard Bank also attempted to discuss his indebtedness with him at his workplace but with no success (par [3]). As the account consistently remained in arrears, on 15 July 2010 Standard Bank sent him a section 129 notice by registered mail at the address appointed by Mr Kubyana in the instalment sale agreement. The track and trace report from the Post Office indicated that the section 129 notice reached the Pretoria North Post Office on 20 July 2010 and on the same day the Post Office sent a notification to the address appointed by Mr Kubyana. The notification was to inform him that an item had been sent by registered mail and it needed to be collected. The Post Office sent another notification after seven days of which

he did not respond. As a result the Post Office returned the unclaimed notice to Standard Bank. Standard Bank proceeded to issue summons on 28 September 2010 against Mr Kubyana for cancellation of the instalment sale agreement, and further that Mr Kubyana has to return the motor vehicle and pay incurred damages. In his plea Mr Kubyana alleged that the High Court does not have jurisdiction to entertain the matter because Standard Bank failed to comply with its obligation in terms of section 129 as well as the terms of his agreement. In that, his account was not in arrears when the section 129 was sent to him (par [6]). The matter proceeded to trial before Ledwaba J in the North Gauteng High Court. Standard Bank adduced evidence to establish the following:

- Mr Kubyana's account was in arrears.
- The Standard Bank had taken steps to bring the default to his notice.
- The Standard Bank had sent a section 129 notice by registered mail to the address chosen by Mr Kubyana, as indicated in the instalment sale agreement.
- The section 129 notice reached the correct branch of the Post Office.
- The notification from the Post Office was sent to Mr Kubyana's address (par [7]).

At the trial Mr Kubyana did not testify. He did not also give any explanation for his failure to collect section 129 notice 9 (par [7]). As a result the High court came to the conclusion that Standard Bank had no obligation to use any additional means to make sure that Mr Kubyana receives a section 129 notice (par [8]). The Court held that Mr Kubyana has a duty to explain why section 129 notice did not reach him, despite all reasonable efforts undertaken by Standard Bank. According to the Court such failure to give explanation had to be used against him (par [7]). Mr Kubyana appealed against the decision of North Gauteng High Court to the Supreme Court of Appeal. The Supreme Court of Appeal dismissed his application for leave to appeal. He proceeded to the Constitutional Court (par [9]).

5. CONSTITUTIONAL COURT

At the Constitutional Court Mr Kubyana argued that according to the decision in *Sebola v Standard Bank of South Africa* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR (for discussion of the decision in *Sebola v Standard Bank* see Fuchs "The Impact of the National Credit Act 34 of 2005 on the Enforcement of a Mortgage Bond: *Sebola v Standard Bank of South Africa* 2012 5 SA 142 (CC)" 2013 *PER* 377-392) if there is sufficient evidence that section 129 notice was sent by the registered post and that particular notice was actually returned to the credit provider as unclaimed. It serves as an indication that there has not been a proper delivery as prescribed by the NCA since the notice was not received by the intended consumer (par [11]). Therefore a court hearing the matter must adjourn the proceedings as indicated in section 130(4)(b) of the NCA. In this instance the court cannot grant judgment (par [11]). Mr Kubyana further argued that he is entitled to information as long as such information is required for the exercise or protection of his right. In this regard he specifically relied on section 8(3), 32(1)(b) and 39(2) of the Constitution of the Republic of

South Africa Act, 1996 (the Constitution) read with section 129 and 130 of the NCA.

Standard Bank argued that once it has been proved that a section 129 notice was sent by registered mail to the correct branch of the Post Office, the credit provider may credibly contend that the consumer has received the notice (par [12]). The burden therefore shifts to the consumer to assert that the notice did not reach him. In response to the argument of right to access to information the Standard Bank contended that reliance on section 32(1)(b) of the Constitution was misplaced. Standard Bank also contended that it had kept Mr Kubyana informed of the state of his account and therefore, he was not deprived of the relevant information (par [13]). The Socio-Economic Rights Institute of South Africa (hereafter 'SERI'), which joined the proceedings as a friend of the Court (*amicus curiae*), was of the view that the relevant question in the light of the decision in *Sebola v Standard Bank* was whether the section 129 notice came to the attention of the consumer. SERI contended that because section 129 notice did not come to the attention of Mr Kubyana there had been non-compliance with the NCA. And further that the North Gauteng High Court should have adjourned the proceedings. It further contended that the Court should have directed that the Standard Bank ought to make diligent assurance that the notice reached Mr Kubyana (par [14]).

The Constitutional Court considered this matter as it raised constitutional issues. The matter involves the interpretation of the NCA notice provisions, which have implications to "fundamental notions of equity and the transformation of the credit market" (par [16]). The Court also held that the matter required it to clarify the scope and application of the decision in *Sebola v Standard Bank*. There were a number of conflicting decisions dealing with the meaning of section 129 and the interpretation of that provision by the Court in *Sebola v Standard Bank*, and subsequent courts, for example, *ABSA Bank Ltd v Mlipha* 2013 ZASCA 139; 2014 (1) All SA 1 (SCA); as well as the Court in *Balkind v ABSA Bank* 2012 ZAECGHC 102; 2013 (2) SA (ECG); and the Court in *ABSA Bank v Peterse* 2012 ZAWCHC 168; 2013 (1) SA 481 (WCC); together with *ABSA Bank v Mkhize* 2012 ZAKZDHC 38; 2012 (5) SA 574 (KZD); and the Court also took into account the decision in *Nedbank Ltd v Binneman* 2012 ZAWCHC 141; 2012 (5) SA 569 (WCC). The court therefore granted leave to appeal based on the reasons stated above.

- The Court confirmed that the purpose of the NCA is to protect the consumer. In this regard the Court observed the provision of section 3 of the NCA. This provision states that the purpose of the NCA is to be achieved by making credit accessible to those who could not access it.

- The credit was historically inaccessible by the disadvantaged community as enunciated in section 3(a). This section deals with reckless credit which is granted to the consumer, and it is read with section 3(a)(ii). These sections deal with a situation wherein there is inequality between the credit provider and consumer. This is further explained in section 3(e), see (par [22]) of the case.

- The Court confirmed the decision in *Standard Bank v Sebola* that section 129(1) should be read in

conjunction with the relevant provisions of section 130 entitled 'Debt procedure in a Court'.

- The Court referred to the decision in *Standard Bank v Sebola* in which it was stated that section 129 prescribes what the credit provider should do, in the case where the consumer is in default. It indicated further that the consumer has a variety of options, namely to satisfy the outstanding debt without recourse to litigation. Section 130 on the other hand states the way in which the credit provider should discharge this obligation of the delivery of notice to the consumer (par [26]).

The question is, what should the credit provider do in order to meet the standard prescribed by the NCA for the purpose of delivery of notice in terms of section 129 (par [26]).

The Court referred to sections 65, 96, and 168. Section 65(1) states that a document under the NCA should be delivered in a prescribed manner. Section 65(2) indicates that if there is no method prescribed for delivery, the party who delivers the document should make such document available to consumer in person and at the premise of the consumer. Alternatively at a place designated by a consumer, or by fax, email, or even printable web-page. Section 96(1) of the NCA provides that a party wishing to deliver a notice under the NCA should use the address that is indicated in the credit agreement or the address that was recently given by the recipient subject to section 96(2). Section 168 states that a notice or document under the NCA will be deemed to be properly served if it has been delivered to that person or sent to the last known address of the recipient by registered mail.

The Constitutional Court while delivering judgment concurred with the view of the High Court in *Standard Bank v Sebola* that there is no general requirement that a section 129 notice should be brought to the subjective attention or personal service of the consumer. The Court held that the credit provider discharges his obligation in terms of section 129 by way of section 65 when ensuring that a notice is available to the consumer. According to the Court this accords with section 130(b)(i). Section 130(1)(b)(i) permits a credit provider to approach a court to enforce a credit agreement in a case where a consumer has not responded to section 129 notice. According to the Court in *Standard Bank v Sebola* the credit provider has the following in a case where the consumer has elected to receive notices by way of post:

- "respecting the consumer's election;
- undertaking the additional expense of sending notices by way of registered rather than ordinary mail;
- ensuring that any notice is sent to the correct branch of the Post Office for the consumer's collection (par [32])."

The Court further held in *Standard Bank v Sebola* [77] that it would be assumed that notification of the arrival of a section 129 notice had reached the consumer if the reasonable consumer would make sure that he/she retrieved the item (par [33]). The Court held that if the credit provider complied with these three steps mentioned above, nothing more would be expected from the credit provider. It would be up to the consumer to show that the notice had not come to his attention and state the reasons why it did not (par [35]).

According to the Court a person who elect to receive notice by way of registered post have a duty to collect item when receiving notification, unless circumstances do not permits (par [37]). The Court held further that a consumer who unreasonably fails to comply with the aforesaid duty cannot raise a defence of non-compliance with section 129 by a credit provider (par [38]).

The Court further held that the notion of 'reasonable consumer' implies obligations for both credit providers and consumers. The Constitutional Court concluded that the NCA does not require a credit provider to bring a section 129 notice to the subjective attention of the consumer. According to the Court, if the consumer has elected to receive notices by way of postal service the credit provider has the following obligations (par [39]):

- "dispatching the notice by registered mail;
- ensuring that the notice reaches the correct branch of the Post Office for collection (*Standard Bank v Sebola* par [75 and [77]);
- ensuring that the Post Office notifies the consumer (at her designated address) that a registered item is awaiting collection (*Standard Bank v Sebola* par [75 and [77])."

The Court held that if the consumer acts unreasonably the credit provider may proceed to enforce the debt despite the consumer's failure to engage with the contents of the section 129 notice (par [40]).

6. DECISION IN STANDARD BANK V SEBOLA

The Court went on to consider the decision in *Sebola* as to what the credit provider has to prove in order to satisfy the court that it has discharged its obligation. The Court noted that in *Standard Bank v Sebola* judgment, the Court was concerned with a rescission of default judgment and in this matter Standard Bank had dispatched a section 129 notice to the wrong branch of the Post Office. The Registrar of the High Court granted default judgment against Mr and Mrs Sebola. They successfully appealed to the Constitutional Court. The Court quoted the following paragraphs from the decision in *Standard Bank v Sebola*:

"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) (par [79])."

And paragraph 87: "If in the contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim. If it finds that the credit provider has not complied with section 129(1), it must in terms of section 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed."

The Court held that the judgment in *Standard Bank v Sebola* was not concerned with the situation where the notice had been validly delivered by the credit provider but remained uncollected or unattended to by the consumer. The Court held in paragraphs 79 and 87 that there is an obligation on the credit provider to prove that the section 129

notice 'in fact reached the consumer'. According to the Court this statement must be 'understood in the light of *Sebola's* attempt to prescribe a method of fact determination for courts faced with applications for default judgment. The court should indicate which factual inferences may be drawn in a situation where factual sources are few' (par [47]). The court held that it is a misconception the idea that a section 129 notice should not reach a consumer (par [47]).

In *Standard Bank v Sebola* the court said: "The credit provider's summons or particulars of claim should allege that the [section 129] notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection. 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 (par [77])."

The Court rejected the argument by Mr Kubyana that 'contrary indication' shows that if the section 129 notice did not come to the subjective attention of the consumer it suffices to show that the requirements of section 129 have not been complied with (par [50]). The Court held that the NCA does not permit a consumer to unreasonably fail to act upon a notification from the Post Office. As a result impedes or hinder the credit provider to the enforcement of debt (par [51]). The Court further indicated that a 'contrary indication' is a factor indicating that a notification from Post Office did not reach a consumer designated address regardless of all the necessary efforts undertaken by the credit provider (par [52]). The Court also held that another 'contrary indication' may also be a factor indicating that a consumer acted reasonably in failing to collect a section 129 notice after receiving a notification from the Post office (par [52]).

According to the Court once a credit provider has established proof in the form of a track record and trace report indicating that the notice was sent to the correct branch of the correct Post Office and that Post Office has sent a notification to the consumer, the credit provider has discharged its obligation. The burden then shifts to the consumer to show and explain why it was not reasonable to expect the notice to have come to his or her attention. Failure to do so would mean that the allegations by the credit provider will stand (par [53]).

Jafta J who wrote a separate judgment and concurred with majority decision of the Court indicated that if a consumer in defending the matter can prove that at the relevant time he/she was lying unconscious in hospital the credit provider would fail to prove delivery and the court would be of the view that the notice did not reach the consumer (par [82]).

The Court per Mhlantla AJ held that Standard Bank had complied with the requirements of section 129. It found that the Standard Bank had sent the section 129 notice via registered mail to the Pretoria North Post Office elected by Mr Kubyana and the same Post Office had sent two notifications to Mr

Kubyana's designated address indicating that the registered item was awaiting his collection (par [55], [58]). The Court held in the absence of any explanation it may reasonably assume that he received the notifications from the Pretoria North Post Office (par [55], [58]). The Court also found that there is no basis upon which it could determine that despite efforts by the Standard Bank, it was reasonable for Mr Kubyana not to have taken receipt of the section 129 notice. With regard to the issue of access to information the Court found that Standard Bank did everything required by law and provided Mr Kubyana with information regarding his default and his statutory rights. (par [59]).

7. ANALYSIS OF THE CASE

The Constitutional Court agreed with the High Court that the requirement to 'draw the default to the notice of the consumer in writing' will be discharged when the credit provider makes the document available to the consumer. Further that, where a consumer such as Mr Kubyana elects to receive documents by post, and the credit provider respects that election and incurs the additional expense of sending notices by way of registered mail rather than ordinary mail, the credit provider shall have discharged its obligation. The credit provider must ensure that any notice is sent to the correct branch of the Post Office nominated by the consumer. It will be assumed that notification of the arrival of the section 129 notice has reached the consumer if the reasonable consumer would make sure that he/she retrieved the item.

The question remains whether a consumer who elected to receive a section 129 notice by registered mail and then failed to collect the registered item after notification from the Post Office can escape liability. According to the decision in *Kubyana v Standard Bank*, a consumer will not escape liability. The consumer would only escape in exceptional circumstances such as where it can be proved that at the relevant time the consumer was lying unconscious in hospital. In such a case the credit provider would have failed to prove delivery and the court would be of the view that the notice did not reach the consumer. More pertinently, Mr Kubyana did not testify or give any explanation for his failure to collect the section 129 notice from the Post Office and according to the Court such failure counted against him. The Court did not have information that enabled it to decide whether it was reasonable for Mr Kubyana to fail to collect the notice.

On the other hand, the legislature has also tightened the procedure by including the peremptory provision that a consumer must indicate the preferred method of delivery (section 129(6) and notice in terms section 129(1)(a) must be delivered to the consumer by way registered mail or to adult person (section 129(5) and that the written confirmation by postal service or its authorised agent will constitutes delivery (section 129(7)(a)). In a case of an adult the signature or identifying mark of such person would constitutes deliver (section 129(7)(b)).

According to the Court, once the credit provider proves in the form of a track record and trace report indicating that the notice was sent to the correct branch of the Post Office and that the

Post Office sent a notification to the consumer, the credit provider has discharged its obligation. The burden shifts to the consumer to show and explain why it was not reasonable to expect the notice to have come to his/her attention. However, Mr Kubyana elected not to testify.

It is interesting to note that the Court considered the decision in *Standard Bank v Sebola* and clarified the position as to what should be done by the credit provider to satisfy the court that the credit provider discharged its obligation. The Court clearly indicated that paras 79 and 87 create the erroneous impression that section 129 notice should in fact reach the consumer. Accordingly, a section 129 notice does not have to come to the subjective attention of the consumer (see *Otto and Otto National Credit Act Explained* (2013) 117 and *Van Heerden and Coetzee "Artikel 129(1)(a) van die Nasionale Kreditwet 34 van 2005: verwarring oor voldoening"* 2012 *Litnet (Akademies) Regte* 256, 285).

The court also clarified the statement in *Standard Bank v Sebola* concerning *contrary indication*. According to the court a 'contrary indication' may be a relevant factor indicating that a notice did not reach a designated address of the consumer having regard all the efforts by the credit provider. Even any factor indicating that a consumer did not act unreasonably in receiving a section 129 notice may be regarded as *contrary indication* (par 52]).

8. CONCLUSION

The decision in *Kubyana* is of paramount importance in law. This decision is distinguishable from that of *Sebola* in that, in *Sebola* the section 129 notice was dispatched to the wrong branch of the post office, while in *Kubyana* the section 129 notice was dispatched to the correct branch of the post office. It is safe to say consumers who elect to receive section 129 notices through the Post Office will have to take notifications from the Post Office seriously. Failure to give due regard to such notifications requiring the collection of a registered article may lead to unexpected results. Only the consumers who provide a full explanation and substantial reasons for failure to collect the registered item will escape liability and benefit in terms of section 130(4)(b) under which the court will adjourn the proceedings and allow rescission of judgement. On the other hand, credit providers should ensure that the section 129 notice is sent to the correct address chosen by the consumer. The legislature also tightened the position by making it mandatory for the consumer to stipulate in writing whether they would prefer to receive notices by registered mail or the notice to be delivered to the adult person at the place chosen by the consumer. The Constitutional Court held that under section 129 of the NCA, a credit provider wishing to enforce its rights under a credit agreement must deliver a notice to a consumer setting out the consumer's default and drawing the consumer's attention to his/her rights. Importantly, the Constitutional Court confirmed that once a credit provider has produced the track and trace report indicating that the notice was sent to the current branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, the credit provider

would generally have shown that it had discharged its obligations under the NCA to effect delivery.

It will then fall on the consumer to explain why it is not reasonable to expect the notice to have reached him/her attention. The Constitutional Court therefore held that the applicant was at fault of not attending to the receipt of the notice. The Constitutional Court remarked that section 129 notice of the default is one of the crucial components to the NCA in striving to achieve non-litigious dispute resolution. This has significant implications for credit providers where they seek to enforce claims based on credit agreements and where they are required to deliver a section 129 notice.

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