

The new approach to s 129 of the National Credit Act

Kubyana v Standard Bank of South Africa Ltd (CC) (unreported case no CCT65/13, 20-2-2014) Mhlantla AJ (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J and Van der Westhuizen J concurring)

By Mohau Romeo Tsusi

Standard Bank sent a s 129 notice in terms of the National Credit Act 34 of 2005 (NCA) by registered mail to Mr Kubyana (Mr K). The notice reached his local post office, which in turn, sent out a notification to the address nominated by Mr K as his *domicilium*. After the first notification was sent to his address, he failed to collect the registered mail. Seven days later, a second notification was sent to the same address. He again failed to collect the mail and the post office returned the s 129 notice to Standard Bank.

Standard Bank subsequently issued summons against Mr K. He in turn, filed a special plea on the grounds that Standard Bank had failed to comply with its obligations in terms of s 129.

The matter then proceeded to trial in the North Gauteng High Court, Pretoria. Ledwaba J held that Mr K could not testify or provide an explanation for his failure to collect the s 129 notice. He upheld that Standard Bank had no obligation to use additional means to ensure that he received the s 129 notice. Further, Mr K had a duty to explain why the notice did not reach him, notwithstanding Standard Bank's efforts, and that his failure to do so had to count against him.

Mr K sought an application for leave to appeal the decision of Ledwaba J in the Supreme Court of Appeal (SCA), however, the SCA dismissed the application for leave to appeal.

The Constitutional Court

Mr K then sought an appeal in the Constitutional Court on the basis that Standard Bank had not complied with its obligation in terms of s 129 of the NCA and could not commence legal proceedings until such obligation had been complied with. Standard Bank argued that s 129 of the NCA had been complied with.

Mr K relied on a judgment in *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC), where he contended that if there is evidence that the notice was sent by registered post but was unclaimed and returned to the credit provider, there is no proper delivery as required by the Act, hence the notice had not come to the attention of the consumer for whom it was intended, thus there is presence of 'contrary indication'.

- See 2013 (July) *DR* 26.

The Constitutional Court had two questions to answer. Firstly, what are the steps a credit provider must take to ensure that notice of default reaches a consumer before it may commence litigation? Secondly, what must the credit provider prove in order to satisfy the court that it discharged its obligation to effect proper delivery of statutory notice?

Relevant sections of the NCA for effective delivery

Section 130 read with s 129, prescribes that this must be done by way of delivery. The credit provider must indicate in writing to the relevant consumer that he or she is in default and that he or she has certain statutory remedies available to him or her in order to satisfy his or her outstanding debt without recourse to litigation.

Section 65 provides that delivery can be made in accordance with a particular mode chosen by the consumer and be effected in accordance with that election.

There is no general requirement that the notice be brought to the consumer's subjective attention by the credit provider, or that personal service on the consumer is necessary for a 'valid delivery' under the NCA.

Mhlantla AJ, opined that if the legislation meant either of these aspects to be a necessary 'condition' for delivery, express provisions would have been made for them.

Therefore, the s 129 obligation on a credit provider to 'draw the default to the notice of the consumer in writing', is discharged, in the words of s 65(2)(a) by the credit provider 'making the document available to the consumer'. Section 130(1)(b)(i) provides for the credit provider to enforce its rights if a consumer has not responded to a s 129 notice, by way of commencing legal proceedings.

Delivery according to the NCA

Be that as it may, the credit provider still needs to take certain steps to ensure that a consumer is adequately informed of his or her right. However the credit provider cannot be, 'non-suited' or 'hamstrung' if the consumer unreasonably fails to engage with or make use of the information provided.

The court held that the Act requires an acceptable mode of delivery from the credit provider, but not the bringing of the contents of the s 129 notice to the consumer's subjective attention. To do so would be to impose an excessively onerous standard of performance on the credit provider and impossible to fulfil.

This delivery will be achieved by means of postal services. In this regard, registered mail is more essential than ordinary mail. When a consumer has elected to receive notices by way of post, the credit provider's obligation to deliver ordinarily consists of –

- respecting the consumers election;

- undertaking the additional expense of sending notices by way of registered mail rather than ordinary mail; and
- ensuring that any notice is sent to the correct branch of the post office for the consumer's collection.

The steps the credit provider must take in order to effect delivery are those that would bring the s 129 notice to the attention of a 'reasonable consumer'. Thus delivery must be interpreted to mean that the reasonable consumer would receive the s 129 notice.

Onus of proof

After a credit provider has dispatched the notice by registered mail and the post office has delivered the notification to the designated consumer's address, a valid delivery will not have taken place if the notice has not come to the attention of a reasonable consumer.

If the above requirements have been complied with, it is up to the consumer to show that the notice did not come to his or her attention and reasons why it did not. If the consumer acts unreasonably, the credit provider may go ahead and seek enforcement of the credit agreement, notwithstanding the consumer's failure to engage with the contents of the notice.

The credit provider must show as proof of delivery that:

- The s 129 notice was sent by registered mail and delivered to the correct branch of the post office (deduced from a track and trace report).
- The post office informed the consumer that the registered item was available for collection.
- A notification from the post office reached the consumer, which may generally be inferred if the notification was sent to the correct postal address as designated by the consumer.
- A reasonable consumer would have ensured retrieval of the registered item from the post office.

Unless, there is a 'contrary indication', showing that in the circumstances and despite the credit providers efforts –

- the notification did not reach the consumers designated address; and
- the consumer acted reasonably in failing to collect or attend the notice, despite delivery of the notification to his or her address, then the credit handler has not complied with the NCA.

The credit provider has to provide a track and trace report indicating that a s 129 notice was sent to the consumer by the post office, discharging its obligation under the Act to effect delivery, and has done what is necessary to ensure that the notice reached the consumer. It is then up to the consumer to explain why it is not reasonable to expect the notice to have reached his or her attention, if he or she wishes to escape the consequences of the notice. Thus, the consumer in this regard bears the onus of proof.

Correct application of the *Sebola* case and the interpretation of s 129 notices:

The Constitutional Court clarified the scope and interpretation of the *Sebola* case, as is evident from a number of conflicting superior court decisions, when dealing with the meaning and interpretation of s 129.

In *Nedbank Ltd v Binneman and Thirteen Similar Cases* 2012 (5) SA 569 (WCC), in the Western Cape High Court, a s 129 notice was interpreted to mean that it is sufficient that the credit provider dispatched the notice by registered mail to the consumer. Further the court held that the *Sebola* case did not change the legal position, as it was held in *Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA), that delivery would be satisfied if the credit provider dispatched the notice by registered mail to the consumer.

However, *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* 2012 (5) SA 574 (KZD), in the KwaZulu-Natal High Court, and *Balkind v ABSA Bank* 2013 (2) SA 486 (ECG) in the Eastern Cape High Court, altered the *Rossouw* position, both relying on the judgment in the *Sebola* case, which held that proof of one more step was required, namely that the notice had reached the 'correct post office' and that proof by means of the 'track and trace' report will constitute proper delivery.

Mhlantla AJ interpreted the meaning of s 129, and held that its purpose is twofold –

- it serves to ensure that the attention of the consumer is sufficiently drawn to her default; and
- it enables the consumer to be empowered with knowledge of the variety of options she may utilise in order to remedy the default.

In a concurring judgment, Jafta J, considers the words 'providing notice to the consumer' in the *Sebola* case, to be synonymous with the phrase 'delivered a notice to consumer' as appears in s 129 read with s 130. Thus a notice must reach the consumer but it does not mean that the notice must be actually viewed by the consumer or come to his or her attention.

Consequently, dispatching of a notice by registered mail, and showing that it has reached the correct post office, was held to be facts that do not form part of the interpretation. Thus, the determination of facts to the *Sebola* case to prove delivery of notice must be placed before the court by the credit provider, which shows that the notice, on the balance of probabilities, reached the consumer, and left before the court where the proceedings are launched to decide. It is that court that must be satisfied that s 129 has been followed. Jafta J, provides that this is what the *Sebola* case must be understood to state.

Conclusion

Therefore, Mr K relied on the wrong interpretation of the *Sebola* case, which was not concerned with a situation where a notice had been validly delivered by the credit provider, but remained uncollected or unattended to by the consumer. In *Sebola*, the notice was sent to the wrong post office.

It is sufficient that the s 129 notice is sent to the consumer and notification dispatched, satisfying the requirement that delivery has been effected. It is then, up to the consumer to elect whether he or she collects the notice or not; alternatively the credit provider is discharged from any liability according to s 129 read with s 130, and may commence legal proceedings.

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