IN THE KWAZULU-NATAL HIGH COURT DURBAN

REPUBLIC OF SOUTH AFRICA

In the matters between:

CASE NO: 4084/2012

ABSA BANK LIMITED Plaintiff

and

BHEKANI ERNEST MKHIZE First Defendant

THOLAKELE CONFIDENCE MKHIZE Second Defendant

CASE NO. 4115/2012

ABSA BANK LIMITED Plaintiff

and

SEAN CHETTY Defendant

CASE NO. 3882/2012

ABSA BANK LIMITED Plaintiff

and

DALUBUHLE XOLANIE MLIPHA Defendant

JUDGMENT

Delivered : 6 July 2012

P J OLSEN, AJ:

[1] ABSA Bank Limited featured as the applicant in four applications for default judgment in respect of home loan mortgage bonds which came before me in the motion court on 12 June 2012. Being aware of the judgment of the Constitutional Court handed down on 7 June 2012 in *Sebola and Another v Standard Bank of South Africa Ltd and Others* [2012] ZACC 11, counsel for ABSA handed up 'track and trace' printouts from the website of the South African Post Office relating to the notices in terms of section 129 of the National Credit Act, 34 of 2005 ('section 129 letters') which had been despatched in each case by registered post to the defendants concerned. The Act requires the delivery of a section 129 notice before proceedings are launched to enforce a credit agreement. Until the decision in *Sebola* all that was required to establish the delivery of such a notice by registered post was proof of its despatch. *Sebola* held that proof of one step more, that is to say delivery to the addressee's post office, was necessary. The track and trace reports generated by the website of the Post Office facilitate such proof.

[2] In each of the four cases the section 129 letter was annexed to the summons, as was a copy of the receipt from the post office reflecting that it had been despatched. In each of the four cases the track and trace report revealed that the letter had reached the correct post office. But in three out of the four cases (the ones before me now) the report revealed that the registered item had nevertheless been returned unclaimed. ABSA wished to argue that proof of delivery to the correct post office was sufficient, in the light of the majority judgment in *Sebola*. The three applications were adjourned to be argued on 28 June 2012 upon the basis that ABSA would be entitled to supplement the papers already before the court.

[3] In each of the three applications ABSA sought not only a money judgment but also an order declaring the mortgaged property specially executable; and as to this latter relief, it was supported in each case by an affidavit setting out the material

mentioned in the practice notice governing such applications in this division when the immovable property in question is the primary residence of the defendant.

[4] I have had the benefit of full written and oral argument presented by two counsel for ABSA (for which I am indebted to counsel) as well as further material regarded by ABSA as relevant to the decisions which I am asked to make in these three applications.

[5] In broad outline there are two questions which need to be resolved in each of the applications.

(a)Firstly, may I conclude in the light of the majority judgment in *Sebola* that there has been compliance with section 129 (1) of the Act despite the fact that the notices in terms of that section were returned unclaimed.

(b)If I conclude that there has not been compliance with section 129 of the Act, what order or directions should be given under section 130(4)(b)(ii) of the Act as to the steps to be taken by ABSA before it may resume its quest for judgment.

[6] Although the new material placed before me by ABSA for the purpose of the hearing on 28 June goes more to the second enquiry than it does to the first, I think that I should give an account of it before turning to the decisions I am asked to make.

[7] The Banking Association of South Africa ('BASA') was one of the parties which sought and was granted leave to intervene before the Constitutional Court in *Sebola*. I was informed from the bar that BASA and the National Credit Regulator ('NCR') were given notice of this matter and were invited to intervene, but that only BASA showed any interest. At the request of ABSA, BASA agreed to place before me the material it had put before the Constitutional Court. (An affidavit confirming this by the person who attested to BASA's affidavit in *Sebola* was provided.)

[8] There are certain statistics contained in BASA's affidavit, derived from the Consumer Credit Market Report for the third quarter of 2011 issued by the NCR, which were highlighted in the present matters by ABSA. I summarise them.

(a)The total outstanding credit balance owed to South African banks in September 2011 was R1 119,30 billion.

(b)The total credit balance outstanding and owed to other credit providers was R147,20 billion.

(c)The amount owing and secured by mortgage bonds over immovable property in South Africa was some R786 billion.

(d)Determined as a percentage of debt in monetary terms, debt which was current (not in arrears) ranged from a low of 75,4 per cent (in the case of unsecured personal loans) to a high of 89,435 per cent (in the case of secured credit in the form of motor vehicle finance).

(e)Measured by consumers, the statistics are perhaps more revealing. Out of 19,1 million South African credit consumers :

(i)10,27 million consumers (53.8 per cent) were in good standing;

(ii)some 2,7 million consumers (14,2 per cent) were one to two months in arrears;

(iii)some 3,57 million consumers (18,7 per cent) were three months or more in arrears.

[9] The affidavit presented by BASA also dealt with the question of how registered mail works. Given the other evidence put before me by ABSA, the only aspect of BASA's account which I need mention is the fact that when a letter is returned, the post office is unable to provide the reason for return; for instance whether the recipient has left the address or has simply failed to take delivery. (It turns out that there is one exception to this, which will be mentioned later.)

[10] ABSA itself provided evidence concerning its own processes, the extent of the defaults it must deal with and its experience of the postal system.

[11] ABSA pointed out that it is a misconception that banks 'pounce upon any act of default by a consumer and seek to proceed (immediately) by legal action'. It points out that its aim is to bring arrears up to date if at all possible without expenditure on legal fees. Although the deponent to ABSA's affidavit could speak directly only to its own processes, he did say that he is aware from interactions with other banks that the other large banks follow similar pre-legal processes before handing matters over to attorneys for collection. It is not necessary to provide a detailed account of the processes which are followed. I will attempt a summary.

[12] When a consumer falls into arrears ABSA's computers automatically generate alerts which may be conveyed to the consumer through sms messages or telephone calls, and an attempt is made thereby to secure a promise to pay from the consumer. All exchanges and events are recorded on a computerised system so that the history of the account can be monitored and accessed when that is necessary.

[13] Once an account has been in arrears for 31 consecutive days ABSA's computerised system generates a section 129 letter which is sent by registered post. The significance of the 31 day period is that the consumer has missed two payment cycles if the account is in arrears for 31 (consecutive) days.

[14] If the consumer's account remains 'delinquent' for more than 60 days ABSA usually sends out an official known as a 'risk mitigation officer' who will attempt to speak to the consumer at his or her home or place of work. This apparently often results in the situation being resolved. It is also at this stage that, for instance in the case of motor vehicle finance, the consumer may agree that the best course is to surrender the vehicle so that it can be sold.

[15] In the case of home loans one of the options available to consumers who simply cannot cope with the instalments is what ABSA calls a 'help-you-sell' programme. Estate agents are appointed and if an offer is received it is up to the consumer to accept or reject it. But unfortunately this programme is often invoked by consumers whose accounts are substantially in arrears and who use it as a dilatory tactic, never intending to accept any offer which might be produced.

[16] It is only when all of these efforts fail that ABSA hands an account over to attorneys. This rarely happens before the account has been in arrears for four payment cycles. The deponent to ABSA's affidavit summarises the position as follows.

'Thus, by the time the matter is handed over to attorneys, the customer is significantly in arrears, a s129 letter has been sent by the bank and the plaintiff has made numerous attempts to contact the customer and remedy the situation.'

[17] I was provided also with the records of the exchanges between ABSA and the various defendants in the matters now before me. In the cases of Chetty and Mlipha the exchanges were extensive. In comparison the exchanges in the matter of Mkhize were brief.

[18] I turn now to some statistics provided by ABSA. This information was provided in order to indicate the extent of the problem with which ABSA is confronted.

[19] ABSA's home loan book is a large part of its consumer credit business by value, but forms a small portion of its business in terms of numbers of accounts or consumers. I have been provided with a table indicating the foreclosure instructions issued to attorneys in respect of home loans for each of the six months from December 2011 to May 2012. By my calculations the average number of instructions issued per month in that period was 881; and the average amount of debt involved in

each of those months was R532 million. (These are ABSA's figures for the whole of South Africa.)

[20] During the period January to May 2012 (five months) ABSA despatched some 5 195 section 129 letters in respect of unsecured loans (some 3 803 of which had already been removed from ABSA's balance sheet by reason of the extent of default). In the same period 19 555 section 129 letters were sent out to consumers in respect of default on credit card debt.

[21] During 2012 ABSA's computerised system has to date generated between 10 000 and 15 000 section 129 letters per month in respect of asset and vehicle finance. (This section of the business has been worse before. In February 2010, 26 000 such letters were sent out. The deponent to the affidavit suggests as the likely explanation the fact that the prime rate of interest was then higher than it is now.)

[22] Finally, when a matter is handed over to attorneys the usual arrangement is that another section 129 letter is sent, by the attorney on this occasion, so that proof of despatch is readily to hand.

[23] ABSA has also made an effort to provide evidence regarding its experience, and that of its attorneys, with the delivery of notices in terms of section 129 of the Act by registered post. Insofar as the numbers of letters returned are concerned, the evidence appears to be me to be acceptable and instructive, despite the fact that before the judgment in *Sebola* there was no need to keep statistics of the numbers of registered letters returned unclaimed, although one of ABSA's employees did do so in respect of unsecured loans and credit cards.

[24] ABSA provided an affidavit by one Barbara Mfusi, employed by the South African Post Office as the Area Manager : Highway Area, to describe how the registered post system works. It may be summarised as follows.

(a)Letters to be sent by registered post are brought to the sender's post office and handed in there, where an acknowledgment of receipt is provided. (This acknowledgement is the proof of despatch typically provided by attorneys.)
(b)The registered items are then sorted according to the post office to which they are to be directed, and sent to that destination post office accompanied by a 'despatch bill' for that post office.
(c)When the letters arrive at the destination post office an employee writes and sends out a first notification slip to the intended recipient's address. If the address is a street address the notification is sent as if it is ordinary mail, and placed in the post box at that address. If it is a P O Box address it is placed in the appropriate box at the post office.
(d)If the mail remains uncollected for a further ten days a second and final collection notice is prepared and sent the same way. (This second notification is not shown on the internet track and trace report).
(e)If the mail is collected proof of identity must be provided by the person concerned and that is recorded on the post office system. It sometimes happens that the addressee attends, but after having sight of the letter refuses to accept it. In that case the track and trace report will include the phrase 'refused' when the item is returned to the sender.
(f)Uncollected mail is returned to the sender after it has remained at the receiving post office for thirty days from date of despatch (as I understand it, the date of despatch from the sending post office). The various events are recorded on the track and trace report. There is normally a delay of between one and two days between the occurrence of each event (for instance the arrival at the destination post office) and the availability of that information on a track and trace report.

[25] The fate of registered letters sent in compliance with section 129 of the Act under this postal regime is a matter of some importance. The statistics which have been provided by ABSA are, to say the least, startling.

[26] Quite fortuitously (in the light of the decision in *Rossouw v First Rand Bank 2010 (6) SA 439 (SCA)*) ABSA's National Manager: Legal Recoveries happened to have compiled and retained statistics regarding the returns of section 129 letters sent by ABSA during the period January to May 2012 in respect of unsecured loans. The statistics cover South Africa as a whole. Of the 1392 letters sent in respect of unsecured loans still on ABSA's balance sheet, 66,3 per cent were returned. Of the 3803 letters sent in respect of unsecured loans off ABSA's balance sheet, 70 per cent were returned. Of the 19 555 letters sent in respect of credit cards, 70 per cent were returned.

[27] I have been provided with an affidavit by the attorney who acts for ABSA in the three matters before me. He does a lot of bank collection work. He has not kept statistics, but can say with certainty that more than half of the section 129 letters sent by his office are returned unclaimed. They are returned to his office 'by the box–load'. If he had to commit to a figure, he would think that it is 70 per cent of the registered letters that are returned.

[28] I have been provided with an affidavit by an attorney who represents ABSA in collection matters in Cape Town. His estimate is that 50 per cent of the registered section 129 letters his office sends out are returned unclaimed. He mentions that he had thirteen matters on the roll in Cape Town on 15 June 2012. Eight of the matters had to be postponed as the section 129 letters had not been collected by the defendants.

[29] I have also been provided with an affidavit by an attorney who attends to ABSA's home loan and asset and vehicle finance matters in Pretoria. He too has not kept detailed statistics but estimates that 70 per cent of the registered section 129 letters his office sends out are returned unclaimed.

[30] In *Rossouw* the court held that registered mail is a more reliable means of postage[1]. It also held, when comparing ordinary mail and registered mail in the light of section 65(2)(a)(i) of the Act, that the 'greater includes the lesser'.[2] As to the latter proposition reference was made to *Maharaj v Tongaat Development Corporation (Pty) Ltd*[3] where Wessels JA made the observation with regard to registered letters that there is 'at least, a high degree of probability that most of them are delivered'. This approach was endorsed by the majority in *Sebola*[4] where the court added this.

'But, the fact that 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.'

[31] The deponent to ABSA's principal affidavit offers some explanation for why ABSA's experience with registered post as a means of transmitting notices in terms of section 129 of the Act contradicts the assumptions made in *Rossouw* and *Sebola.* He speaks to the behavioural patterns of distressed consumers, as he puts it 'from my own experience as the plaintiff's legal counsel, within its group litigation department, where dealing with defaults and recoveries is an integral part of my responsibility and from my experience as an attorney dealing with recoveries matters for the plaintiff'. (He was previously a practising attorney.)

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[1] See para 30.
[2] See para 57.
[3] 1976 (4) SA 994 (A) at 1001 A – B.
[4] See paras 68 and 75, also with reference to *Maharaj.*

[32] He points out that by the time such letters are sent the consumer is well aware of the condition of default. The consumer 'is generally aware that all options short of litigation have been exhausted and there are difficult times ahead'. Consumers will therefore tend to avoid registered mail items because 'they mean trouble'. Many such consumers who know they cannot meet their obligations 'wish to forestall or avoid the inevitable 'crunch' of having to hand back the vehicle they are no longer paying for, or having their assets attached to pay the long outstanding credit card bill'.

[33] It seems to me that the procedure or system in place for the handling of registered mail in 1976 (when *Maharaj* was reported) was not the same as the one which operates now. The subject is dealt with at page 1001 of the report, where the court spoke of the letter reaching the purchaser 'or, at least, (being) made available to him at an address where he is likely to be placed in possession thereof'. It spoke of evidence that the letter was 'delivered at the specified address' as constituting prima facie proof of delivery to the addressee. That no longer happens. Registered letters are collected, not delivered; and the notifications that they are available for collection proceed as ordinary mail from the addressee's post office to the address in question, with the result that there is no record of the actual delivery of the collection notice at the intended recipient's address.

[34] Of course that is not to say that the evidence before me establishes that the current system of registered post is not as good as the one employed in 1976. What it does establish, however, is that the current system is more often than not inadequate when employed to bring notices to the actual (as opposed to presumed) attention of consumers who are in financial distress.

[35] I have no evidence before me of the efficiency of the postal services with respect to ordinary mail. But I do not think that I overreach the boundaries of judicial notice by suggesting that in the case of post directed at consumers in financial

distress, ordinary post is by a substantial margin more reliable than registered post. The country would be in an uproar if anything like 50 per cent (let alone 70 per cent) of ordinary mail went astray. Indeed, it seems reasonable to suppose that the proportion of ordinary mail lost is lower than 50 per cent by a very considerable margin. But of course the difficulty with ordinary mail, in the context of section 129 of the Act, is that nothing can be proved through direct evidence besides posting, unless the credit provider receives a response to the letter from the consumer.

[36] I turn now to the first of the questions posed in these applications for default judgment, namely whether the fact that the registered section 129 letters were returned unclaimed means that these cases must be adjourned as contemplated in section 130(4)(b) of the Act.

[37] It is perhaps appropriate that I attempt a summary of the applicable legislative provisions, ignoring matters of detail and cross-references to provisions not material in the present context.

[38] Section 129(1)(a) of the Act is to the effect that when a consumer is in default a credit provider 'may' in writing 'draw the default to the notice of the consumer' and propose that the consumer refer the matter to a third party such as a debt counsellor or ombud with the intention that, if there is a dispute, the parties resolve it, or with the intention that a plan be developed and agreed upon to bring payments up to date. Section 129(1)(a) does not render the delivery of such writing compulsory. If it did, the credit provider would be in breach of the provision in the statute if it did not act in terms of the section even when the default is insignificant, and does not raise any alarm.

[39] However section 129(1)(b) is to the effect that a credit provider cannot commence legal proceedings to enforce the agreement without first 'providing notice to the consumer' as contemplated in section 129(1)(a). It is a condition imposed by section 130(1) that a credit provider cannot approach the court to enforce the credit

agreement unless at least ten business days have elapsed since the credit provider 'delivered a notice to the consumer as contemplated in . . . section 129(1)'.

[40] Section 130(3) is to the effect that the court may not 'determine' a matter in which enforcement of a credit agreement is sought unless the court is satisfied that the 'procedures required by' section 129 'have been complied with'. And section 130(4)(b) is to the effect that if in such proceedings the court is not so satisfied, it must adjourn the matter before it, and 'make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed'.

[41] The judgment of the Supreme Court of Appeal in *Rossouw* settled conflicting single-judge decisions concerning the questions as to what 'providing notice to the consumer' means where it appears in section 129(1)(b), and the circumstances in which a court could be satisfied that there had been compliance with that requirement when the post is used to provide notice.[5] In order both to establish what section 129(1)(b) requires, and also to determine what would suffice as proof that the requirement has been met, the court in *Rossouw* reasoned mainly around three sections of the Act which deal with delivery of documents or notices, that is to say sections 65(2), 96 and 168.

[42] Again in summary :

(a)section 96 provides that when a legal notice is required it must be delivered to the intended recipient at the address of that party set out in the agreement, or at the address most recently provided by that party when giving notification of intention to change that party's address set out in the agreement;

(b)section 65(2) of the Act determines that in the absence of a method prescribed by regulation for delivery of a particular document, a document required to be delivered to a consumer must be made 'available to the

[5] A convenient list of the decisions, and summary of the finding in each, appears in note 6 to the majority judgment in *Sebola*.

consumer' through one or more of a number of alternative mechanisms (including ordinary mail), and that the delivery must be made in the manner chosen by the consumer from those options set out in the section; and
(c)section 168 is to the effect that when the Act requires a document to be served it 'will have been properly served' when it is either delivered to that person or 'sent by registered mail to that person's last known address'.

[43] The court in *Rossouw* reasoned as follows.[6]

(a)Section 129(1) does not state how notice is to be provided to the consumer, and where section 130(1) provides for the time which must elapse before the court is approached it is measured from when the section 129 notice is 'delivered' to the consumer. But the term 'delivered' is not defined in the Act.
(b)Delivery by post is one of the options given in section 65(2).
(c)Section 96 deals with delivery of notices providing that notices must be delivered at the selected address.
(d)Registered mail, being more reliable, is a selection which may be made in compliance with section 65(2).
(e)Section 168 is to the effect that 'sending' a document by registered mail to a person's last known address is proper service (unless otherwise provided for in the Act) and 'service' is synonymous with 'delivery'.
(f)These provisions 'put it beyond doubt that the legislature was satisfied that sending a document by registered mail is proper delivery'. And 'send' means 'despatch', and does not include 'receipt'.
(g)Given that the consumer is allowed the choice of mode of delivery, the legislature intended the risk of non-receipt to lie with the consumer.

[44] *Rossouw* accordingly held that

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[6] See paras 22, 23, 29, 30, 31 and 32.

(a)when registered post is the mode of delivery, despatch of the registered item is all that the credit provider need prove;
(b)the fact that the letter does not reach the address (or the consumer) is of no consequence in the enquiry as to whether there has been compliance with section 129 of the Act; where registered post is properly employed, despatch on its own constitutes compliance with section 129.

[45] In *Sebola* it was decided that proof of despatch is on its own insufficient to satisfy a court that there has been compliance with section 129(1) of the Act. The credit provider must go further and establish that the registered item reached the addressee's post office. ABSA argues that *Sebola* otherwise left intact the finding in *Rossouw* that the risk of non-delivery lay with the consumer, merely altering the regime set out in *Rossouw* by providing that the risk in effect passes when the section 129 letter reaches the recipient's post office, and not at the earlier stage when it is despatched from the sender's post office. And accordingly, following *Sebola*, in cases such as the three before me, the court should accept the track and trace report as proof of the fact that the registered item reached the recipient's post office, but ignore the fact that the report establishes conclusively that the item did not reach the consumer's address (or the consumer).

[46] ABSA refers to the fact that one of the purposes of the Act is to promote equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers[7]; that the court in *Sebola* accepted the proposition that the Act calls for a 'careful balancing of the competing interests sought to be protected'[8]; and that indeed, in its analysis of what may be assumed upon proof that the notice reached the correct post office, *Sebola* incorporates the proposition that 'a reasonable consumer would have ensured retrieval of the item from the post office'.[9]

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[7] Section 3(d).
[8] Para 40.
[9] Para 77.

[47] *Sebola* recognises that section 65(2) of the Act indicates that 'delivery' entails making the document 'available'.[10] ABSA argues that the Constitutional Court also recognised that neither section 96(1) nor section 168 implies a requirement of proof of actual delivery to a specified address; section 168 on the contrary providing that proof of despatch is sufficient for purposes of service.[11] Ultimately ABSA's argument is to the effect that what *Sebola* determined is that the credit provider need do no more than prove that it took reasonable measures to ensure that the notice reached the consumer's address, so that, if the consumer acted reasonably, the notice should have come to his or her notice.

[48] ABSA points out that the NCR, in its submissions to the Constitutional Court, argued that one of the averments which the credit provider must make in order to satisfy the court that the notice was received at the stipulated address is that it was not returned to the sender.[12] And yet, argues ABSA, the majority judgment in *Sebola* contemplates only two scenarios, namely unopposed matters where it is sufficient for the credit provider to prove the arrival of the notice at the recipient's post office, and opposed matters where the consumer responds to the summons and makes submissions to the court on the subject of compliance with section 129(1) of the Act. This is said to be significant not only because the NCR raised the question of returned items, but because the Constitutional Court would have been aware, inter alia because of its judgment in *De Beer v North Central Local Council*[13], of the obligation of the credit provider to disclose the fact that a section 129 notice had been returned unclaimed. It is argued that this omission on the part of the court in *Sebola* to deal with what must have been an obvious potential factual scenario (i.e. the return of registered items), indicates that the decision of the majority in *Sebola* does not contradict or seek to contradict what was decided in *Rossouw*, namely that the risk of ultimate non-delivery lies with the consumer; this notwithstanding the fact that *Sebola*

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[10] Paras 67 and 68.
[11] Paras 69 and 70.
[12] Paras 27 and 49.
[13] 2002 (1) SA 429 (CC), para 25.

would allow the consumer who appears to oppose the enforcement of the credit agreement to raise the question of non-receipt, and claim the benefit of the processes contemplated by section 129(1)(a) before legal action proceeds any further.

[49] The marriage of the judgments in *Rossouw* and *Sebola* proposed by ABSA would make a contribution to the efficient and cost-effective administration of justice in connection with the enforcement of credit agreements. Indeed, the essence of ABSA's argument before me (that the risk of non-delivery lies with the consumer once the registered item reaches the consumer's post office) accords with the judgment of the Western Cape High Court delivered on 21 June 2012 in the matter of *Nedbank Limited v Anelene Binneman and 12 similar cases*[14]. In that case the court held that it did not read the judgment of the majority in *Sebola* as having overruled the principles laid down in *Rossouw* and in *Munien v BMW Financial Services*[15] which had been specifically endorsed more recently in *Majola v Nitro Securitisation*[16]. The court in *Nedbank* found it unnecessary to come to a conclusion as to what was meant, for instance in paragraph 87 of the majority judgment in *Sebola*, where the court held that proof that the notice reached the appropriate post office would constitute sufficient proof of delivery 'in the absence of contrary indication'.

[50] My difficulty with many of ABSA's arguments is that they offer more support for the proposition that *Rossouw* was correctly decided than they do for the proposition that *Sebola* actually endorsed *Rossouw*, subject only to the one obvious point of difference. Furthermore, ABSA's submissions do not address the crucial difference between the reasoning adopted in *Rossouw* and that followed in *Sebola*. In *Rossouw* the court decided that upon a proper construction of the provisions of the Act dealing with delivery, all that the legislature required was that the (registered) letter should be despatched. There is nothing arbitrary about selecting that point as the one where the credit provider's duty is discharged; from that point onwards the

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[14] Case number 7241/11.
[15] 2010 (1) SA 549 (KZD).
[16] 2012 (1) SA 226 (SCA).

process of delivery is beyond the control of the credit provider. In *Sebola*, on the other hand, according to ABSA the court decided that the credit provider's duty is discharged (i.e. the requirements of section 129(1) are met) when the letter reaches the consumer's post office. Given how registered post works, the selection of that point in the process may very well have been significant given the facts in *Sebola*, but in the ordinary case (where the letter reaches the correct post office) the selection of that point in the process would be entirely arbitrary but for the fact that the attainment of it can be proved. That seems to me to be no justification for a finding that the legislature ordained that the credit provider's obligations under section 129(1) of the Act are discharged when the letter reaches the consumer's post office.

[51] Applying the well-known principles governing the rules of interpreting a court's judgment set out in *Firestone South Africa (Pty) Ltd v Genticuro A.G.*[17], I am unable to reach the conclusion that the majority judgment in *Sebola* sanctions this court ignoring conclusive evidence that the section 129 notice did not reach either the consumer or the consumer's address; which is what would be required to be done to hold in the circumstances of the three cases before me that compliance with section 129(1) of the Act has been proved. It is unnecessary for me to furnish a complete analysis of the majority judgment in *Sebola* in order to express my reasons for having come to this conclusion. I will confine myself to what appear to me to be the essentials.

[52] In paragraph 57 of the majority judgment the following appears.

'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*.' (My emphasis.)

And further, in the same paragraph after referring to section 130 as imposing an obligation to deliver the notice, the judgment proceeds as follows.

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[17] 1977 (4) SA 298 (A) at 304.

'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.*' (My emphasis.)
And a little later in paragraph 60, immediately before turning to the subject of the meaning of 'delivered' in section 130 of the Act, the majority judgment makes the point that before the credit provider seeks enforcement 'the legislation insists the consumer should have the benefit of a notice'. This is described as a 'plain statutory objective' which must influence the meaning of the word 'deliver'.

[53] From the aforegoing one may deduce that the majority judgment in *Sebola* holds that actual notice to the consumer is indeed the standard set by section 129(1) of the Act. And one would assume that in the subsequent paragraphs of the judgment, where the subject is the quantum of proof necessary to be tendered by the credit provider (given that proof of actual notice to the consumer will in most cases not be feasible), everything that is said will be qualified, or should be taken to be qualified, by a *caveat* that proof positive of the fact that the notice did not reach the consumer trumps any conclusion which may be drawn from facts which suggest that the notice ought to have reached the consumer. In my view a proper reading of the subsequent paragraphs of the judgment does in fact reveal that the decision of the court in *Sebola* as to what will 'ordinarily' suffice cannot be read to convey or imply an endorsement of the decision in *Rossouw* that once what will 'ordinarily' suffice is proved, the question as to whether the notice actually reached the consumer is irrelevant.

[54] In paragraph 72 of the majority judgment in *Sebola* the court noted that section 129 'requires that notice be provided to the consumer' and held that the obligation to 'deliver' the notice must be read in the light of the importance of that notice. In paragraph 73, after endorsing the Supreme Court of Appeal's observation that section 65(2) 'expressly attaches value' to the communication method chosen by

the consumer, and that choice entails responsibility[18] the court in *Sebola* states the counter-argument that a fair reading of the statute 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.'

[55] In paragraph 74 of the judgment the court then reached the conclusion that an understanding of the meaning of the term 'deliver' in section 130 must be found in a broader approach by determining what the credit provider should establish 'by way of proof that the section 129 notice in fact reached the consumer'. In my view if one knows that 'in fact' the section 129 letter did not reach the consumer then evidence which might have gone the other way in other circumstances becomes irrelevant, and the court in *Sebola* must have been alive to that. Indeed, at the end of paragraph 74 of the majority judgment it is stated that the point of the evidence is to 'satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer'. It is impossible so to be satisfied if one knows that as a matter of fact the notice did not reach the consumer because it was returned to the credit provider.

[56] In that context what is conveyed in paragraph 77 of the majority judgment is clear enough. Coupled with the required allegations in the credit provider's summons, proof that the notice reached the correct post office brings about that 'it may reasonably be assumed *in the absence of contrary indication*, . . . that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office'. (My emphasis.)

[57] That is why, in my view, in paragraph 78 of the majority judgment, the court in *Sebola* held that the evidence to which it had referred would 'ordinarily' constitute adequate proof of delivery of the section 129 notice.

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[18] See para 32 of the judgment in *Rossouw*, where this is said to point inexorably 'to an intention to place the risk of non-receipt on the consumer's shoulders'.

[58] Finally, in my view paragraph 79 of the majority judgment in *Sebola* puts it beyond doubt that the Constitutional Court has not endorsed the decision in *Rossouw* that the risk of non-delivery lies with the consumer. The paragraph of the judgment ought to be quoted in full.

> '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).'

[59] The adjournment contemplated by section 130(4)(b) of the Act is one which takes place because the court has found that there has not been compliance with section 129 of the Act (or rather that it is not satisfied that there has been such compliance). If delivery to the consumer's post office is compliance, then it would not be open to the court, no matter the evidence tendered by the consumer, to adjourn the case in terms of section 130(4)(b), as the enquiry into whether there had been compliance with section 129(1) of the Act would be closed. (Of course, especially where the judgment sought involves permission to execute against a primary residence, the fact that the section 129 notice had not actually been delivered may feature as a consideration going to the exercise of the court's discretion with regard to that form of relief, or with regard to any other discretion which in a particular case may arise because of the provisions of the Act, but an adjournment eventuating in such circumstances would not be one in terms of section 130(4)(b) of the Act.)

[60] I conclude, accordingly, that in the three matters before me there has not been compliance with the procedures required by section 129 of the Act, as a result of which I must adjourn these matters and make appropriate orders as to the steps ABSA must complete before these matters may be resumed.

[61] In *Nedbank* the court found that in four of the 13 matters before it there had not been compliance with section 129 of the Act because the letters had not been properly posted, or because the letter in question had not reached the correct post office. It accordingly made a direction in terms of section 130(4)(b) that the requisite notice be given 'in any manner authorised by the Act *and chosen by the defendant in terms of s65(2) of the Act.*' (My emphasis.) That order was appropriate because of the court's finding that delivery to the correct post office constitutes compliance with section 129(1) of the Act. Of course, in the light of the decision I have reached as to the effect of the judgment in *Sebola*, the *Nedbank* order would not be appropriate. In the light of the evidence placed before me of just how unreliable registered post is in the case of distressed consumers, the grant of that order in cases where the section 129 letter reached the correct post office, but was nevertheless returned, would in all probability yield nothing as, on the available evidence, it is overwhelmingly probable that compliance with the order would not achieve compliance with the Act. (Resending by registered post might prove successful if in the particular case the first attempt at delivery had failed because the consumer omitted to collect the registered item through inadvertence, or perhaps because of a temporary absence. But the failure rates of 50 per cent to 70 per cent which ABSA has established must be the product of deliberate evasion in the overwhelming majority of cases.)

[62] The problem I have identified with the order granted in *Nedbank* (in the context of the decision which I have reached as to the meaning of *Sebola*) does not arise in the three cases before me. That is because in each case the consumer(s) concerned chose an address, but not the mode of delivery to that address. As I read section 65(2) if the consumer has not chosen one of modes set out in section 65(2)(a) of the Act, then all of them are available to the credit provider.

[63] Nevertheless, the order I make in these matters under section 130(4)(b) should be consistent with what I might regard as an appropriate wider framework within which to handle the problems which have arisen in connection with registered

post, and which will in the future arise in many thousands of cases both in the High Courts and the Magistrates Courts. In considering the shape which such a framework may take it must not be overlooked that whereas section 129(1) has the most laudable purpose of avoiding litigation, it and the related sections of the Act cannot be taken to have been designed as a mechanism either to prevent access to court by credit providers, or to render it so difficult and time consuming that otherwise unnecessary write-offs feature as viable alternatives to the enforcement of a credit provider's rights. To adopt a phrase from BASA's affidavit, such an outcome would be likely to have a 'chilling effect' on the credit market, which in my opinion would be felt most amongst disadvantaged communities who may not have the privilege of living in a place where postal deliveries to their homes are made (or of internet access or fax machines), and whose fair and reasonable access to credit as a means of advancing themselves in our economic society is one of the goals of the National Credit Act.[19]

[64] The first question is whether the 'appropriate order' contemplated by section 130(4)(b)(ii) must be one which achieves compliance with the provisions of section 65(2)(b), which requires delivery to the consumer in the manner chosen by the consumer. If that method has failed, and on the available evidence is likely to fail again, insisting upon compliance with section 65(1)(2)(b) being achieved will in all probability impose a bar against the credit provider resuming its action. In my view the discretion given the court in section 130(4)(b)(ii) is wide enough to permit an order which appears to the court to offer a reasonable prospect of achieving compliance with section 129(1) of the Act despite the fact that the order does not stipulate the consumer's chosen mode of delivery.

[65] It seems to me that the execution of any order which the court makes should be capable of generating proof upon a balance of probabilities that there has been compliance with section 129(1) of the Act (as long as no contrary indications emerge

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[19] See in particular section 3(a) of the Act.

before the credit provider asks the court to allow the matter to be resumed). In my view the order should not be framed in terms which render compliance with it a substantial obstacle to the exercise of the credit provider's right of access to court. The order should reflect the need for 'a careful balancing of the competing interests sought to be protected'.[20]

[66] The evidence placed before me by ABSA establishes that, contrary to the position taken in *Rossouw* and *Sebola*, far from being a more reliable method than ordinary post of getting notices to a distressed consumer, registered post is in fact likely to fail.[21] The only advantage of registered post, on the evidence before me, is the facility of proof; and if the experience of ABSA and its attorneys reflects the experience of other lending institutions, what will be facilitated in most cases is proof of failure. In my view it is accordingly worth having another look at ordinary post when registered post has failed, despite the expressed preference of both the Supreme Court of Appeal and the Constitutional Court for registered post. Ordinary post is after all sanctioned by section 65(2) of the Act. Furthermore, when registered post has failed because the consumer did not collect the letter, there is a high degree of probability that the consumer has avoided delivery. That must be put in the scale when balancing the interests sought to be protected.

[67] But if ordinary post is to be sanctioned, then I think it is important that credit providers wherever possible increase the level of probability attaching to ultimate receipt by sending the notice not only to the chosen address of a consumer, but to all other addresses where, according to the records of the credit provider, the consumer may be found. I have in mind the place of work of the consumer who is employed; the address of a family member which might have been provided at the time credit was applied for, and so on. Collating the necessary information and sending out multiple

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[20] *Sebola*, para 40.

[21] As far as I can ascertain no factual evidence was placed before either the Supreme Court of Appeal or the Constitutional Court concerning the reliability of the two postal alternatives. Thus, I think, the reference made in both cases to *Maharaj* as authority for the proposition that registered post is more effective.

letters may well impose an additional administrative burden. But that does not seem to me to be an unreasonable imposition given the importance of achieving compliance with section 129(1) of the Act, and given the fact that success opens the way to judicial enforcement if the offer of the processes contemplated by section 129(1)(a) is declined, or if they fail. I think that if ordinary post is to be sanctioned, it should be accompanied by another attempt at delivery by registered post to the consumer's selected address. This would meet the case of the consumer who did not evade receipt of the first letter, but failed to collect it for some other reason.

[68] Section 65(2) of the Act offers other alternatives, any one of which may in a particular case be more conveniently employed by the credit provider, as long as it is in a position to satisfy the court that the method will probably be employed successfully.

[69] Employing the sheriff has been raised before as an alternative and viable means of achieving compliance with section 129(1) of the Act. In my view that alternative should be regarded as a last resort for the following reasons.

> (a)The only mode of service which the sheriff could employ in precise compliance with section 129(1), read with section 65(2) of the Act, would be personal service, and given the difficulties often experienced in effecting personal service that is likely to be expensive.
> (b)It is correct that proof of delivery to the address of a consumer (as opposed to delivery to the consumer) can be readily provided through the sheriff at a cost in most cases lower than might be incurred to achieve personal service. But like any postal delivery, that does not guarantee that the notice will come to the attention of the consumer; which raises the question as to whether the other considerations I mention hereunder do not outweigh the advantage of proof of delivery achieved by employing the sheriff.

(c)ABSA has provided me with evidence on oath illustrating that, staffed as they are at present, sheriffs' offices are unlikely to be able to handle the delivery loads which would be imposed on them by the banking industry if the sheriff is to be employed to serve section 129 notices in all cases where registered post has failed.

(d)ABSA has provided evidence of the numbers of section 129 letters it sends out. If, as a matter of course, courts order service by the sheriff as a substitute for each of the 50 per cent to 70 per cent of ABSA's notices which are returned unclaimed, and follows the same practice in the case of other banks, that is likely to have a meaningful impact on the nature of the mandate given to sheriffs. At the moment a sheriff's mandate is to see to the proper and efficient service and execution of court process. I do not think that it would be wise for the courts to follow a course which might compromise the performance of that mandate without the subject first being properly researched so that steps may be taken to avoid collateral damage to the performance of the fundamentally important role now played by sheriffs in the administration of justice.

[70] There are many actions launched before the judgment in *Sebola* waiting in the wings, with track and trace reports recording that the mandatory section 129(1) notice has been returned unclaimed. If my construction of the judgment in *Sebola* is correct, then in each of these cases the matter will have to be placed before the court in order to obtain the directions contemplated by section 130(4)(b)(ii) of the Act. It seems to me that when these matters are placed before the court the credit provider should provide information on oath which will enable the court to decide which of the options furnished by section 65(2) are likely to generate a decision that on the probabilities the notice has reached the consumer. Using ordinary post as an example, such an affidavit would disclose the information available to the credit provider as to addresses in addition to the selected one, to which ordinary mail might be directed with a reasonable expectation that it will come to the attention of the

consumer. The quality of service of the summons already effected may persuade the court that posting to the service address will be sufficient, especially if it is the address selected by the consumer. It would be of undoubted assistance to the court if such an affidavit were to be accompanied by a draft order reflecting the credit provider's submissions as to what would constitute an appropriate order under section 130(4)(b)(ii) in the particular case.

[71] In the three cases before me I do not have all of the information I have referred to above. But given the exigencies of the occasion, I propose to work around that.

[72] I should mention that if

(a)my interpretation of the effect of the majority judgment in *Sebola* is correct;

(b)my understanding of the options available to a court under section 130(4)(b)(ii) is correct; and

(c)other judges share my view that there is value in ordinary mail, and that the use of it may justify a conclusion in an appropriate case that notice has probably reached the attention of a consumer

then the question arises as to whether in future cases it may not be possible to take steps to avoid the costs involved in more than one hearing in motion court being necessary before default judgment can be granted in unopposed matters.

[73] I do not believe that in actions which have already been instituted it is possible to argue that anything favourable to the credit provider can be deduced from the absence of an appearance to defend despite the fact that the section 129 notice was attached to the summons. The consumer must suppose, unless he or she takes legal advice, that the opportunity offered by section 129(1) has passed, and that it cannot be resurrected. However as the precursor to actions instituted after *Sebola* it might be a good idea for the credit provider not only to send the section 129 notice by registered post (that being compulsory in the light of the decision in *Sebola*, and

probably mandatory also by virtue of the provisions of most credit agreements), but also and at the same time to send the same notice by ordinary post to the selected address and to any other address which may appear to hold out a prospect of delivery to the consumer. The summons could then be endorsed with words drawing the consumer's attention to the fact that the litigation instituted by service of the summons is only permissible in the event of the annexed section 129 notice having come to the consumer's attention, and to the consumer's right to defend the action upon the basis that the notice was not received, even if the consumer otherwise admits liability for the claim. If that is done then, despite a negative track and trace report eventuating, the credit provider may be able to persuade the court that it ought to be satisfied that there was compliance with section 129(1) in the light of

(a)an explanation on oath as to the significance of the address or addresses to which the notice was directed by ordinary post, coupled with evidence of posting, and

(b)the quality of service achieved

which together may point to a probability that the absence of opposition supports a conclusion that the notice did reach the consumer.

[74] I now turn to the three cases before me. In the case of Mkhize service was effected on the daughter of the two defendants at the address selected for service. In the case of Chetty the summons was served on the defendant's father at the selected address.

[75] In the case of Mlipha service was effected by affixing a copy to the outer or principal door of the premises at the chosen address. But ABSA engaged the services of a tracing agent whose evidence is before me on oath, and whose investigations revealed that the defendant, who is self-employed, continues to reside at the selected address, but that he is doing his very best to avoid his creditors, apparently in particular because he owes arrear levies with respect to his property of about R80 000.

[76] It accordingly appears that in each of these cases, if a letter is sent by ordinary post to the selected address, as long as it arrives there it is likely to come to the attention of the consumer. And of course in each of those cases ABSA may be able to identify other addresses to which it is worth sending a notice by ordinary mail.

[77] I propose in these cases to leave all options provided by section 65(2) of the Act open. One or more of the other alternatives, including delivery by hand to the address (if not into the hands of the consumer), may be found more convenient, or more likely to generate a successful application to resume the proceedings, depending on the information available to ABSA concerning the consumers in question, and depending on the administrative capacity and manpower available to ABSA to service these matters. Of course, if no response is received from the consumers, the explanation for what was done, and the facts necessary to establish that what was done probably achieved success, will have to be presented by ABSA on oath when it asks the court to make the determination required by section 130(3), and entertain the application for default judgment.

[78] Given the circumstances of the three cases before me I accordingly propose to make an order in each of them along the lines of the one granted by the Western Cape High Court in *Nedbank*.

In each of the three matters before me I make the following order. (In the Mkhize matter references to the "defendant" must be rendered in the plural.)

(1) The application for default judgment is postponed sine die.

(2) The plaintiff is afforded an opportunity to provide a notice to the defendant as contemplated in section 129(1) of the National Credit Act, 2005 through one or more of the mechanisms listed in paragraph

65(2)(a) of the Act, and also by registered post directed to the defendant's chosen address.

(3) Such notice must, in addition to meeting the requirements of section 129(1)(a) of the Act, also draw the defendant's attention to

(a) the fact that action has already been instituted against the defendant, the relevant case number and the fact that an application for default judgment has been postponed sine die;

(b) the current amount of arrears;

(c) the fact that the defendant's rights in terms of the Act, and in particular those contemplated by section 129(1)(a) of the Act, are unaffected by the fact that action has already been instituted.

(4) The plaintiff is granted leave to set down the application for default judgment on notice to the defendant, but may not do so until at least ten business days shall have elapsed since delivery of the notice referred to in paragraph [2] of this order; or if that date is not known, since the date by which the plaintiff contends that such delivery must have been effected.

(5) The application for default judgment shall be accompanied by evidence on oath

(a) establishing to the best of the plaintiff's ability that the notice required by paragraph [2] of this order was provided to

the defendant, and explaining the plaintiff's choice of mode of delivery of the notice; and

(b) dealing with the matters referred to in section 130(1)(b) of the National Credit Act.

(6) (a) The costs incurred in producing the evidence placed before the court for the hearing on 28 June 2012, and all other costs incurred in connection with that hearing, shall be paid by the plaintiff.

(b) Save as aforesaid, the costs of the action to date are reserved for later determination.

OLSEN, AJ

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Date of Judgment	:	6 July 2012