Editor's Note
Urgent action for conflicting judgments

Kim Hawkey – Editor

Conflicting judgments by different divisions of the High Court are not only undesirable, but the result may also infringe on the rights of the public, especially when they relate to matters of great import, such as an individual's home.

The consequent lack of clarity when the courts reach contradictory outcomes threatens one of the basic tenets of the legal system, namely legal certainty. This foundational principle or value of the legal system is essential for predictability, allowing people to regulate their conduct to ensure it meets the required standard.

Two recent examples of the impact of conflicting High Court judgments that have featured in *De Rebus* relate respectively to the meaning of 'delivery' for the purposes of s 129 notices under the National Credit Act 34 of 2005 (see p 38 and p 49) and to rights afforded to attorneys in terms of the Right of Appearance in Courts Act 62 of 1995 (see 2012 (Sept) *DR* 18).

In the former, varying interpretations of one word, namely 'deliver', have led to conflicting outcomes in various divisions of the High Court. In these matters a s 129 notice had been sent by the credit provider to the defaulting debtor by registered mail to the relevant post office, but had been returned to the credit provider.

In June the Constitutional Court, in *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC), ruled that not only must s 129 notices be sent to defaulting debtors by registered mail, but the notice must have reached the relevant post office for delivery to the debtor before the credit provider can take action against him.

The court in the *Sebola* matter did not follow the earlier decision of the Supreme Court of Appeal (SCA) in *Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 639, in which the court held that where a notice is sent by registered post, dispatch on its own is sufficient to comply with s 129.

However, in the same month the *Sebola* decision was handed down, the Western Cape High Court, in *Nedbank Ltd v Binneman and Thirteen Similar Cases* 2012 (5) SA 569, held that the *Sebola* judgment had not overruled the principles laid down in the *Rossouw* matter and that proof of delivery to the appropriate post office was sufficient, regardless of whether the notice was collected by the debtor.

Despite this, in July the KwaZulu-Natal High Court in Durban, in *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* 2012 (5) SA 574, held that proof that a registered letter has reached the correct post office is insufficient to prove delivery if there is evidence that the consumer did not collect the notice. In such instances, the court held that the credit provider is required to take further steps and must prove that the notice in all likelihood came to the attention of the consumer. The court suggested that, for example, in addition to being sent by registered post, the s 129 notice should also be sent by ordinary post to the selected address and 'any other address which may appear to hold out a prospect of delivery to the consumer'.

In the other example that was recently reported in *De Rebus*, conflicting decisions in respect of the Right of Appearance in Courts Act have raised questions such as:

- Is an attorney who has been granted the right of appearance in terms of the Act entitled to appear only in the division of the High Court in which he was admitted or enrolled to practise as an attorney, or is he thereby also entitled to appear in other divisions in which he has not been admitted or enrolled?
- What other functions may an attorney with a certificate of the right of appearance perform in divisions other than the one in which he was admitted or enrolled as an attorney in terms of the Attorneys Act 53 of 1979?

As these examples illustrate, the result of such conflicting rulings is not a matter of insignificance – at stake in some instances is what is often a person's most precious asset, his home.

Although the relevant bank in the *Mkhize* matter has been granted leave to appeal to the SCA on the basis of the conflicting decisions, in such instances surely the Justice Minister should act swiftly in invoking his powers in terms of s 23 of the of the Supreme Court Act 59 of 1959, which provides for him, after consultation with the South African Law Reform Commission, to refer conflicting civil judgments by different divisions of the High Court to the SCA to settle the conflict 'for the future guidance of all courts'?

It seems that this is exactly the situation the legislature anticipated the provision to alleviate. Perhaps it is time for the Law Society of South Africa, on behalf of the public and the profession, to urge the Minister to act in terms of these powers to ensure legal certainty.

It would not only be expedient to do so, but fairness and justice demand it.