THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 716/12

In the matters between:

ABSA BANK LIMITED **APPELLANT**

and

BHEKANI ERNEST MKHIZE **FIRST RESPONDENT**

THOLAKELE CONFIDENCE MKHIZE **SECOND RESPONDENT**

ABSA BANK LIMITED **APPELLANT**

and

SEAN CHETTY **RESPONDENT**

and

ABSA BANK LIMITED **APPELLANT**

and

DALUBUHLE XOLANIE MLIPHA **RESPONDENT**

Neutral citation: *Absa Bank v Mkhize* (716/12) [2013] ZASCA 139 (30 September 2013)

Coram: Lewis, Ponnan, Shongwe, Saldulker JJA and Zondi AJA

Heard: **22 August 2013**

Delivered: **30 September 2013**

Summary: An order postponing the hearing of an application for default judgment so that the plaintiff is given an opportunity to take further steps the high court considers necessary under ss 129 and 130 of the National Credit Act 34 of 2005 is not appealable.

ORDER

On appeal from KwaZulu-Natal High Court, Durban (Olsen AJ sitting as court of first instance):

The appeal is struck from the roll.

JUDGMENT

Lewis JA and Zondi AJA dissenting:

[1] This appeal turns on the interpretation of a decision of the Constitutional Court – *Sebola v Standard Bank*[1] – on the requirements of s 129(1) of the National Credit Act 34 of 2005 (NCA). It lies against a decision of the High Court, KwaZulu-Natal, Durban (Olsen AJ) which set out the steps to be taken to ensure that notice of a consumer's default in meeting an obligation to a credit provider (in this case Absa Bank Ltd – 'Absa') is provided to the consumer, steps necessary in the light of *Sebola*, for the institution of action against a defaulting consumer. The high court placed an interpretation on *Sebola* that is in contention in these matters. Other high courts have interpreted the *Sebola* decision differently.[2]

[2] Absa urged this court to find that Olsen AJ's interpretation was wrong. It should be noted at the outset, however, that the order that the high court made was to postpone applications for default judgment against the four defendants/respondents (consumers) against whom it had sought default

[1] *Sebola v Standard Bank* 2012 (5) SA 142 (CC).
[2] See in particular *Nedbank Ltd v Binneman* 2012 (5) SA 569 (WCC) but contrast *Balkind v Absa Bank* 2013 (2) SA 486 (ECG). The decision under appeal is reported: *Absa Bank Ltd v Mkhize and two similar cases* 2012 (5) SA 574 (KZD).

judgment. The court did not refuse judgment. It required Absa to take further steps before it could set the matters down for hearing again. This court thus raised the question, at the hearing, whether the high court's order was appealable. I shall deal with appealability in due course. It is necessary first to explain briefly what it was that *Sebola* decided, and that the high court considered was required before judgments could be entered against the consumers.

[3] It is important to note at the outset that the consumers, who may or may not have received notice in terms of s 129(1) of the NCA, were not represented in the high court and were not represented on appeal. At the request of this court, Mr Pammenter SC and Mr Veerasamy of the Durban Bar appeared as amici curiae, and the court is grateful to them for doing so. In addition, the Socio-Economic Rights Institute of South Africa Law Clinic (SERI) applied to be admitted as an amicus curiae, which it was, and it was represented by Ms A de Vos SC and Mr S Wilson.

The provisions of the NCA in question

[4] Section 129(1)*(a)* of the NCA requires that before a credit provider such as Absa can institute proceedings against a defaulting consumer, it must 'draw the default to the notice of the consumer in writing' and make proposals as to ways in which the consumer can bring payments up to date. Section 129(1)*(b)* provides that the credit provider may not commence legal proceedings to enforce a credit agreement before first 'providing' the consumer with the notice referred to in (*a*). These sections have been subject to considerable interpretation already: suffice it to say for the moment that this court has held that despite the fact that s 129(1)*(a)* says that the credit provider 'may' draw the default to the notice of the consumer, the former is actually required by the section to do so. It is an essential pre-litigation step: *Nedbank Ltd v National Credit Regulator.*[3] Moreover, s 130(1)*(a)* of the NCA provides that a credit provider may approach a court to enforce a credit agreement only after at least ten business days have

[3] *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA) para 14.

elapsed since 'the credit provider *delivered* a notice to the consumer as contemplated in . . . s 129(1) . . .'. (My emphasis.)

[5] The sections, in so far as relevant, are set out here for the sake of completeness.

'129 Required procedures before debt enforcement

(1) If the consumer is in default under a credit agreement, the credit provider—

(*a*) may *draw the default to the notice of the consumer in writing* and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(*b*) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before—

(i) first *providing notice to the consumer*, as contemplated in paragraph (*a*), . . .; and

(ii) meeting any further requirements set out in section 130.

. . .'. (My emphasis.)

'130 Debt procedures in a Court

(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and—

(*a*) at least 10 business days have elapsed since the credit provider *delivered a notice to the consumer* as contemplated in section 86 (9), or section 129 (1), as the case may be;

(*b*) in the case of a notice contemplated in section 129 (1), the consumer has—

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and

. . .'. (My emphasis.)

[6] The question to be answered is: what do the phrases that refer to the drawing of the default to the 'notice' of the consumer, 'providing notice' to the consumer and 'delivering a notice to the consumer', variously used in ss 129 and 130, mean and what is required of the credit provider? Delivery is the only phrase expressly regulated by the NCA in the section that gives the consumer the right to receive documents. Section 65 provides:

'(1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.

(2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver the document must—

(*a)* make the document available to the consumer through one or more of the following mechanisms—

(i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;

(ii) by fax;

(iii) by email; or

(iv) by printable web-page; and

(*b*) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (*a*).'

[7] Subsections 65(1) and (2) must be read with s 96 which regulates the address for notice. It reads:

'(1) Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at—

(a) The address of that other party as set out in the agreement, unless paragraph (*b*) applies; or

(b) The address most recently provided by the recipient in accordance with subsection (2).

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

[8] The failure of the drafters of the Act to be consistent in their use of terms, and their stated requirements, makes the interpretation of the NCA extraordinarily difficult. The inconsistency, and the confusion that ensues, are evident in the reference in s 65 to ordinary mail, and in s 96 to registered mail. Which is intended?

A synopsis of the interpretations of the NCA requirements

[9] Although I shall turn to the proper construction of these requirements only later in the judgment, I think it necessary, before considering the orders made in the court below, to set out what this court decided on the interpretation of ss 129(1) and 130(1) and how *Sebola* extended that. In *Rossouw v Firstrand Bank Ltd*[4] this court considered the meaning of delivery in ss 129 and 130 of the NCA, and concluded that dispatch by registered post was sufficient for the s 129(1) notice. That despite the fact that s 65 refers to ordinary mail. In that case the consumer had chosen registered mail as the mode of delivery. Maya JA held that, because registered mail is a more reliable means of postage, it was covered by s 65 and 96. It did not offend against the provisions of s 65(2) which refers to ordinary mail. She pointed out that this interpretation was supported by s 168 of the NCA which provides that, unless otherwise provided in the Act, a notice that must be 'served' on a person will be 'properly served' when it is either delivered (in the sense, I assume, of s 96) or sent by registered mail. Maya JA concluded that the various provisions in the NCA 'put it beyond doubt that the legislature was satisfied that sending a document by registered mail is proper delivery'.[5]

[10] Maya JA continued:[6]

[4] *Rossouw v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) paras 30 to 32.
[5] Para 31.
[6] Para 32.

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

[11] But the Constitutional Court considered, in *Sebola*, that proof of mere dispatch was not enough. There had in addition to be proof of receipt at the post office to which the notice was dispatched. I shall return to this finding, and its implications, for they are the crux of the appeal. As I have said, the implications have been differently interpreted by the high courts. In the case before us, Absa contended that the decision of the high court was wrong in its interpretation, which was that even where receipt by the post office was proven, if there was also proof that the consumer had not collected the s 129(1) notice, the notice had not been properly provided.

[12] In this case the credit provider, Absa, adduced evidence that although notices dispatched by registered post had been received by the chosen post offices, and notifications sent to the consumers, the notices had not been collected. Olsen AJ concluded that he could not ignore this fact for reasons to which I shall turn later. Accordingly, he postponed the applications for default judgment and required Absa to take further steps before setting the matters down for hearing again.

[13] Olsen AJ made the following order:

'(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 s 129(1) of the National Credit Act of 2005 through one or more of the mechanisms listed in s 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 s 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 s 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 10 business days shall have elapsed since delivery of the notice referred to in para (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 para (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 s 130(1)*(b)* of the National Credit Act.

(6) (*a)* The costs incurred in producing the evidence placed before the court for 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.'

[14] The high court gave Absa leave to appeal against the order on the basis that there was a reasonable prospect that it would succeed on appeal given the different approach in the *Binneman* matter in the Western Cape High Court, and that the default judgments that he had declined to grant might be obtained on appeal. Olsen AJ took into consideration also the conflict between decisions of

the different high courts and stated that the question must be settled by this court.

[15] As I have said, this court, at the hearing of the appeal, questioned whether the order was appealable, given that it granted a postponement of applications for default judgments. Counsel were asked to provide written heads of argument on appealability after the hearing, which they did, and for which I am grateful.

Appealability

[16] Absa and SERI argued that the order was not simply one for the postponement of an application for default judgment: before Absa could set the matters down for hearing again it was required to take various steps which it considered should not have been required of it. The judgment in *Sebola*, Absa argued, had been misinterpreted and requirements were imposed on it incorrectly: it should not be precluded from obtaining the orders should it fail to take the steps required of it by the high court order. The order was thus definitive of the rights of the parties and final in effect: Absa could not set the matters down again unless it took those steps.

[17] Although the order made by the high court does not appear to meet all the tests laid down by this court in *Zweni v Minister of Law and Order*[7] (the order must be final in effect and not susceptible to alteration; it must be definitive of the rights of the parties, granting definite and distinct relief; and it must dispose of at least a substantial portion of the relief claimed), those requirements are neither cast in stone nor exhaustive. This much was said in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service.*[8] Hefer JA pointed out that the tests did not deal with 'a situation where the decision, without actually defining the parties' rights or disposing of any of the relief claimed in respect thereof, yet has a very definite bearing on these matters'. Thus a refusal by a judge to recuse himself from a matter was held to be a judgment or order susceptible to appeal.

[7] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) 532I-533B.
[8] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A).

[18] In *Jacobs v Baumann NO*[9] this court said that in determining whether or not an order is final one must have regard not only to its form but 'predominantly, its effect'. If an order 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing' it will be appealable. Similarly, in *NDPP v King* Harms DP said[10] that the test was whether the order made was in substance, and not in form, final in effect. The same principle was echoed by Nugent JA in a separate judgment. He said, in response to an argument that an order for the production of documents was interlocutory and thus not appealable:[11]

'I pointed out in *Liberty Life* [*Liberty Life Association v Niselow*[12]] that while the classification of the order [as interlocutory] might at one time have been considered to be determinative of whether it was susceptible to an appeal the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction, between orders that are appealable and those that are not, to one of principle.'

[19] Nugent JA referred to the judgment of Hefer JA in *Moch* and repeated that the *Zweni* tests are not decisive. In my view, the order in this matter rests on a final determination of an issue underlying the applications for default judgment: that default judgment cannot be given against a consumer where, although a s 129(1) notice has been sent by registered post, and received at the post office for the consumer's domicilium, if there is evidence to show that the notice was not collected by the consumer, the notice has not in effect been given. But for that conclusion, the applications for default judgments would not have been postponed. The remainder of the order was based on irrevocable findings on Absa's obligations under the NCA. Unless those findings are overturned on appeal, Absa is bound to take the steps required by the order before exercising its right to obtain default judgments.

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[9] *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA) para 9.
[10] *NDPP v King* 2010 (2) SACR 146 (SCA) para 42.
[11] Para 51.
[12] *Liberty Life Association v Niselow* (1996) 17 *ILJ* 673 (LAC).

[20] The argument of Mr Pammenter, as amicus, was that the order was not appealable as it was merely dilatory in effect, and that Absa was still free to proceed under s 130(4)(*b*)(ii) of the NCA. The argument overlooks the requirements that had to be met before it could proceed: it could not set the matters down again unless and until it had given another notice under s 129(1) which, in addition to meeting the requirements of the section, had to draw to the attention of the consumers that an action had already been instituted and application for default judgment sought; set out the then current amount of arrears and the fact that the consumers' rights were unaffected by the institution of action. Absa was required also to provide evidence on oath establishing, to the best of its ability, that the notice was provided to the consumers and explaining Absa's choice of mode of delivery. If these requirements were not warranted by the decision in *Sebola*, what other path could Absa have followed to enforce its rights?

[21] A further consideration to be taken into account in determining whether an order is susceptible to appeal is what the court intended to achieve in its judgment or order. In *SA Eagle Versekeringsmaatskappy Bpk v Harford*[13] Harms AJA said that the decisive question was what the aims of the parties had been with the litigation and what the court had intended to achieve. If the court had not intended to come to a provisional conclusion that could be amended then its judgment was susceptible to appeal. In this matter Olsen AJ reached firm findings – not provisional conclusions – on what was required for enforcement of the credit agreements before him and made an order accordingly. The refusal to grant the applications for default judgments before those steps were taken was based not simply on the facts of the particular case. It was based on a finding of law that in my view is susceptible to appeal.[14]

[13] *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 792A-C.
[14] See *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 585D-J.

[22] This is borne out by having regard to the effect of the order, which was to add to the obligations of Absa, as credit provider, under the NCA. That order had a very definite bearing on the relief sought by Absa. It was not merely the postponement of a hearing. Nor was a default judgment, or its refusal, itself the subject of the proposed appeal. It was those parts of the order imposing obligations on Absa, and a refusal to grant the relief sought until those obligations were met, that I consider appealable.

[23] In the light of the view that I take of this issue it is not necessary to consider Absa's alternative argument that this court should, in the interests of justice and in terms of ss 39(2) and 173 of the Constitution, develop the common law rules as to appealability. I would merely point out that this is not a matter of extending the common law: the court is bound by the Supreme Court Act 59 of 1959.[15] It cannot assume jurisdiction it does not have. The Constitutional Court has suggested, in *Khumalo v Holomisa*,[16] that the test for hearing appeals in that court should be whether it is in the interests of justice to do so, and that that test would embrace the considerations that have led this court to limiting the meaning of the words 'judgment or order' in s 20 of the Supreme Court Act. The test is not one that has been applied in this court.[17]

[24] It is also not necessary for me to consider the argument that high courts are waiting for guidance from this court on the meaning of *Sebola*, as a consideration in determining appealability. The interests of justice test has not been adopted by this court as the yardstick. And, in the light of the conclusion that I have reached that the orders of Olsen AJ are appealable in accordance with the principles developed by this court, it is unnecessary to consider that test at this stage.

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[15] That Act has now been repealed and replaced by the Superior Courts Act 10 of 2013, assented to on 12 August 2013. The provisions of the Supreme Court Act nonetheless apply to appeals pending at the time of enactment of the Superior Courts Act: s 52.
[16] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 8.
[17] See also *NDPP v King* above para 42.

[25] Having found that the order made by Olsen AJ is susceptible to appeal, I turn now to the merits of the appeal. The judgment of the Constitutional Court in *Sebola* must first be considered.

Sebola

[26] The consumers in this matter, Mr and Mrs Sebola, had applied to a high court for rescission of a default judgment against them allowing the Standard Bank to recover under a credit agreement (a home loan). Before claiming default judgment the bank sent a notice to the Sebolas by registered mail. The high court (South Gauteng) granted default judgment, and a full court, on appeal, dismissed the appeal, relying on the judgment of this court in *Rossouw*. Since there was proof that the s 129(1) notice had been sent by registered mail (although it was accepted that the Sebolas had not actually received the notice) the full court held that the judgment in execution could go ahead. The Constitutional Court allowed a direct appeal to it on the basis that it was in the interests of justice to do so, and despite the fact that the bank had abandoned the judgment that it had obtained.

[27] The loan agreement was concluded in November 2007, and as security for the loan a mortgage bond was registered against the Sebolas' property. In the agreement the Sebolas chose the mortgaged property as the address where notices and legal documents in legal proceedings should be served. In addition, they specified a post office address at which letters, statements and notices 'may be delivered'. They also agreed that 'any letters and notices posted to this address by the Bank by registered post will be regarded as having been received within 14 (fourteen) days after posting'.[18]

[28] In 2009, when the Sebolas had fallen into arrears with the bond repayments, the bank sent a notice in terms of ss 129 and 130, specifying the options that were available to them. The notice was dispatched by registered

[18] *Sebola*, para 4.

mail to the post office address specified by them in the agreement. However, the postal services diverted the notice to the wrong post office. The bank had thus on the face of it done what this court in *Rossouw* considered was sufficient to draw the attention of the Sebolas to its proposed action for payment of the full amount outstanding under the loan agreement, and for an order that the property was executable. The high court had accordingly granted default judgment, and declared the property executable, when the Sebolas did not defend the action. The high and full courts considered that rescission of the judgment was not warranted. The Constitutional Court, however, gave leave to appeal and upheld the appeal after a comprehensive construction of the various provisions of the NCA that deal with the modes of giving notice. (A minority in that court construed the provisions differently, requiring actual delivery, but would also have upheld the appeal.)

[29] I do not propose to set out the reasoning of the majority at length. The essence of the approach adopted by Cameron J was that the NCA had to be considered as a whole, and that its purposes, expressly set out in s 3, were fundamental to the construction of the provisions in question. In particular he referred to s 3(*a*) which states as one of its purposes the promotion of 'the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions'; and to s 3(*d*) which states as a purpose 'promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers'.

[30] Three amici curiae were admitted: SERI, the National Credit Regulator (NCR) and the Banking Association of South Africa (BASA). SERI argued that the s 129(1) notice must come to the actual attention of the consumer. NCR put forward the view that s 129(1) is satisfied when the credit provider has taken the steps necessary to satisfy the court that the notice actually reached the address specified by the consumer. And BASA submitted that it was not in the interests of justice to decide the appeal as the evidence before the court was inadequate.

[31] The court, BASA argued, did not have the information needed to determine the effect of the arguments advanced by the other amici. BASA contended that if the SERI or NCR requirements had to be satisfied the costs to credit providers would run into 'hundreds of millions of rands' which would increase the cost of providing credit to the detriment of consumers. BASA filed an affidavit to this effect. It does not appear from the majority judgment that the affidavit was taken into account. The same affidavit was filed in the Absa matter which is now before this court, and the high court did refer to it – a matter to which I shall return.

[32] In reaching its conclusions, the majority started from the premise that, although *Rossouw* was correct in finding that the consumers had made a choice as to the means by which the notice should reach them, and that with that choice came responsibility (the passage is set out above), this had to be weighed against the fact that most credit agreements are standard documents that do not entail genuine choices, and 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 s 129 notice'.[19]

[33] Cameron J continued:[20]

'These considerations drive me to conclude that the meaning of "deliver" in s 130 cannot be extracted by parsing the words of the statute. It must be found in a broader approach – by determining what a credit provider should be required to establish, on seeking enforcement of a credit agreement, by way of proof that the s 129 notice in fact reached the consumer. As pointed out earlier, the statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible. Nor does it demand proof of delivery to an actual address. But given the high significance of the s 129 notice, it seems to me that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer.

[19] Para 73.
[20] Paras 74-79.

Hence, where the notice is posted, mere despatch is not enough. This is because the risk of non-delivery by ordinary mail is too great. Registered mail is in my view essential. Even though registered letters may go astray, at least there is a "high degree of probability that most of them are delivered" [A reference to *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 (4) SA 994 (A).] But the mishap that afflicted the Sebolas' notice shows that proof of registered despatch by itself is not enough. The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by s 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.

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

The credit provider's summons or particulars of claim should allege that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection. *Coupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed in the absence of contrary indication, and the credit provider may credibly aver, that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office.*

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

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)*.' (My emphasis.)

[34] The majority thus concluded that because the bank could not show that the s 129(1) notice had reached the correct post office, the Sebolas were entitled to rescission of the default judgment against them. 'The proceedings against them should have been adjourned to allow the Bank to rectify the omission in regard to the notice.'[21]

[35] Cameron J concluded:[22]

'For these reasons, adding the indications the Act offers to the signal importance the notice occupies in the statutory scheme, I conclude that the obligation s 130(1)*(a)* imposes on a credit provider to "deliver" a notice to the consumer is *ordinarily* satisfied by proof that the credit provider sent the notice by registered mail to the address stipulated by the consumer in the credit agreement, and that the notice was delivered to the post office of the intended recipient for collection there. [My emphasis.]

To sum up: The requirement that a credit provider provide notice in terms of s 129(1)*(a)* to the consumer must be understood in conjunction with s 130, which requires delivery of the notice. The statute, though giving no clear meaning to "deliver", requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer. Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, *will in the absence of contrary indication* constitute sufficient proof of delivery. If, in contested proceedings, the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim. If it finds that the credit provider has not complied with s 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.' (My emphasis.)

[36] The notice did not reach the correct post office in *Sebola*. Hence the decision of the Constitutional Court that mere proof of posting by registered mail was not enough, and hence the requirement of proof of receipt by the correct post office. But what if the s 129(1) notice is sent to and received at the correct post office, but is not collected by the consumer despite notification having been sent to him or her? That is the problem that faced the high court in this matter, and the other matters that I referred to at the outset. It is far from an unusual

[21] Para 81.
[22] Paras 86 and 87.

occurrence, as these matters demonstrate and as the evidence before the high court showed. I turn then to the facts giving rise to this appeal.

The context in which Absa sought default judgments

[37] Absa sought default judgment against four defendants (consumers) (in three separate matters), having instituted action to enforce its rights under written agreements of loan, all secured by mortgage bonds over the consumers' properties. All four had defaulted. Prior to instituting action Absa had sent s 129(1) notices by registered mail to the correct post offices. Track and trace reports attached to the summons in each case showed that although notification had been sent to each of the consumers, they had not collected the notices. The notices had been sent back to the sender. There was nothing to suggest that the notifications had not reached the consumers. Olsen AJ considered that the effect of the judgment in *Sebola* was that, where a court knew that a s 129(1) notice had not been received by the consumer, it was required to adjourn the proceedings and make orders setting out the steps that Absa had to take before it could re-enrol the matters. I set out the full order and the steps required by the high court earlier.

[38] Absa's argument on appeal was that on the evidence before the court it was probable that the notifications sent by the post office had reached the consumers' chosen addresses and that they had chosen not to collect the notices. It thus submitted that the issue on appeal was whether the requirements of s 129(1)(*b*)(i) are satisfied if it is shown, on a balance of probabilities, that the consumers were aware that the notices were sent to them but elected not to collect them.

[39] Absa was able to show that in each case the consumer was aware of his or her default and that Absa intended instituting action to enforce payment. At the very least, it argued, the consumers in these matters were aware that there was a communication from Absa awaiting collection. Sending the notice by registered

mail and showing receipt at the correct post office was sufficient compliance with the decision in *Sebola*. That was the approach adopted by the Western Cape High Court in *Nedbank v Binneman*.[23] Absa argued thus that the court should work on the assumption that, where it was established that the notice was sent by registered mail, received at the correct post office, and that notification was sent to the consumer, the consumer had deliberately refrained from collecting the notice. The amici pointed out, however, that there might be other reasons why a notice was not collected and that no such assumption could justifiably be made.

[40] The high court had regard to an affidavit of a legal adviser employed by Absa, Mr H W Valentine, who explained the steps taken by Absa to ensure that defaulting consumers were aware that they were in arrears, and that action against them was proposed. I need not traverse those steps. Suffice it to say that Absa's systems ensured that several notices were given to each defaulter before the s 129(1) notice was dispatched and attempts were made to contact him or her by telephone as well. Consumers who had properties mortgaged as security for their debts were offered assistance in selling them. Only after the consumer was in arrears for a lengthy period were instructions given to Absa's attorneys to collect the debts – to institute action. Valentine attached reports showing the steps that had been taken by Absa in respect of the particular consumers against whom the action was brought. The records showed that all three were aware that action was on the cards.

[41] Valentine expressed the view that when a consumer is advised that a document, sent by registered mail, should be collected from the post office, he or she would avoid it as it meant 'trouble'. Valentine attached to his affidavit affidavits from a number of attorneys who acted for Absa in collecting debts. They too averred that a great number of consumers simply failed to collect registered mail, and that the number returned to the sender suggested that the notifications had not simply gone astray. Valentine set out statistics showing the percentages of notices returned to Absa. It appears that in a majority of cases

[23] *Nedbank v Binneman* 2012 (5) SA 569 (WCC).

the notices were returned. It is not necessary to evaluate this evidence. Olsen AJ dealt with it comprehensively in his judgment.[24] Nor is it necessary or even possible to contest it. And of course it was uncontested before the high court as the consumers did not defend the actions or respond to the applications for default judgments.[25]

[42] The high court also had regard to the affidavit that had been placed before the Constitutional Court in *Sebola* by BASA. BASA declined to intervene in this matter, but agreed that Absa could place it before the high court. That affidavit also set out statistics showing the number of consumers in arrears, and the extensive degree of consumer indebtedness in South Africa.

[43] In addition, the high court considered an affidavit of an employee of the post office and accepted that when a notice sent by registered mail is unclaimed it is not generally possible to ascertain why that is so. It found also that the postal system that was discussed in *Maharaj*,[26] on which Cameron J relied in *Sebola*, had changed. At the time when *Maharaj* was decided registered mail was delivered to the addressee's postal address. Proof of delivery was thus, at least prima facie, proof of receipt. The present position is that when registered mail is received at a post office it sends a notification to the intended recipient's address by ordinary mail. If the registered mail is not collected within ten days a second and final notification is sent in the same way. If the addressee comes to collect the registered mail but declines to accept it, the track and trace report reflects that it has been refused. Uncollected mail is returned to the sender 30 days after it has been received at the post office.

[44] Olsen AJ considered that the evidence before him did not establish 'that the current system of registered post is not as good as the one employed in

[24] *Absa Bank v Mkhize* 2012 (5) SA 574 (KZD).
[25] In *Absa Bank Ltd v Petersen* 2013 (1) SA 481 (WCC) para 15 the court indicated that the number of track and trace reports showing that the notice had been returned to sender, attached to applications for default judgment, showed that 'more often than not' the consumer did not collect the s 129(1) notice.
[26] *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 (4) SA 994 (A) at 1001B.

1976'. But he did conclude 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'.[27] He expressed the view that ordinary postal delivery is a more reliable means of bringing notices to the actual attention of consumers. That may be so. It is not necessary to consider the correctness of the assumption. There is no evidence to support it, and in any event this court is bound by the decision in *Sebola* that requires s 129(1) notices to be sent by registered mail. It is unfortunate, however, that the Constitutional Court did not heed the request of BASA to postpone the hearing so that evidence as to effective methods of bringing notices to the attention of consumers could be adduced.

The high court's interpretation of *Sebola*

[45] Although Absa argued in the high court that the majority decision in *Sebola* did not overrule the decision of this court in *Rossouw* – that the risk of non-delivery lies with the consumer when he or she has chosen a method of delivery – Olsen AJ rejected that argument. It will be recalled that in *Sebola* the Sebolas had chosen a post office address to which notices should be sent. The notice had, however, gone astray. Cameron J said, in the passage above, that if, in contested proceedings (I assume that the reference is to a defended action, opposed application for default judgment or an application for rescission of a default judgment) the consumer asserts that the notice had gone astray, or not been 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 s 130(4)*(b*)'.

[46] That, it seems to me, is crucial to the *Sebola* decision: the consumer does not, ultimately, take responsibility for his or her choice. The risk of non-delivery lies with the credit provider. Accordingly, the high court correctly found that it could not ignore conclusive evidence that the notice did not come to the consumer's attention. Olsen AJ said that what the majority in *Sebola* had

[27] Para 34.

decided was that, although a credit provider has only to prove on a balance of probabilities that notice has been provided, there was a qualification to the usual standard: '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'.[28]

[47] It was impossible for a court to be satisfied that a notice did reach a consumer, where it had been dispatched by registered mail and received at the correct post office, if there was evidence to the contrary, said the high court.[29] That conclusion was fortified by the passage in *Sebola* cited above.[30] And that in turn was fortified by the statement in *Sebola* that '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'.[31]

[48] The assumption, as the evidence before the high court demonstrated, is not correct. But the high court's conclusion that that is what the Constitutional Court required cannot be faulted. If the court is faced with allegations that the notice was not brought to the attention of the consumer, it must adjourn the proceedings in terms of s 130(4)*(b)*.

[49] Absa argued that the result was extraordinary and absurd. The effect may well be unfortunate, as was demonstrated in the high court. But it is the necessary implication of the decision of the majority in the Constitutional Court. That court's conclusion was based on the faulty assumption that registered mail is an effective means of bringing a s 129(1) notice to the attention of a consumer.

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[28] Para 53.
[29] Para 55.
[30] Para 79 of *Sebola.*
[31] Para 77.

[50] The conclusion, Absa submitted, would have the result that a consumer who deliberately avoided collection of the notice, could frustrate the credit provider's right. The answer to that is that where there is proof of deliberate failure to collect the notice, after adjourning the hearing, and prescribing the steps to be taken by the credit provider, the court may conclude that the consumer was acting in bad faith and enter judgment. The Eastern Cape High Court, Grahamstown (Alkema J), faced with the same difficulties as those in this appeal, while agreeing with the approach of Olsen AJ, suggested that where the facts show that the consumer was residing at the chosen domicilium, that the notice was sent to the correct post office, that notification was sent to the correct address and there is no 'satisfactory explanation' why the consumer did not collect it, a finding of 'fictional fulfilment' would be appropriate.[32]

[51] I do not think it necessary to go so far. The purpose of s 130(4)*(b)* is to require the court, where a credit provider that has not complied with any provision of the NCA (in this instance it would be non-compliance with s 129(1), as interpreted in *Sebola*), to adjourn the matter and 'make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed'. Once the credit provider complies with the court order, when the matter is set down again the court will doubtless be able to grant judgment. As Alkema J pointed out,[33] the adjournment will increase the burden on the credit provider and on the courts, and will of course increase the cost of providing credit. But that is the consequence of the poorly drafted NCA and the interpretation of its provisions by the Constitutional Court. That court appreciated that consumers would bear the additional costs of obtaining credit by requiring proof of receipt of notices sent by registered mail at post offices. But that was warranted by the importance of ensuring that s 129(1) notices be provided to consumers. Cameron J said:[34]

'I accept that this judgment may heighten the cost of credit and that this will affect the pockets of not only credit institutions but also consumers, particularly those new to the

[32] *Balkind v Absa Bank* 2013 (2) SA 486 (ECG) para 48.
[33] Para 57.

[34] Para 84 of *Sebola*.

credit market. That is a social burden the legislation imposes. The alternative would be to underplay the importance of the notice, and under-weigh the impact of the wording of s 129.'

[52] The costs of adjourning matters so that credit providers can take further steps and give evidence by way of affidavit to establish 'to the best of the plaintiff's ability that the notice . . . was provided to'[35] the consumer and explaining the credit provider's choice of mode of delivery, will add to that which would have been foreseen by the Constitutional Court. But that does not make the order of the high court incorrect.

[53] In all the circumstances I would have dismissed the appeal.

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C H Lewis

Judge of Appeal

PONNAN JA (SHONGWE AND SALDUKER JJA CONCURRING):

[54] I have read the judgment of Lewis JA and regret that I cannot agree with my learned colleague that the order of the high court is indeed appealable.

[55] Section 20(1) of the Supreme Court Act 59 of 1959 creates a right of appeal to this court from a 'judgment or order' of the high court. Whether a decision is appealable has been the subject of detailed analysis in a number of cases over the years. A comprehensive re-examination of those cases would serve little purpose. The salient principles to be distilled from those cases appear in the judgment of Harms AJA in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A). It was said there (at 532J-533A) that a judgment or order is a decision

[35] Para 5 of the high court order.

which, as a general principle, has three attributes: first, the decision must be final in effect and not susceptible to alteration by the court that made it; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[56] What served before the high court was an application for default judgment. A default judgment is a judgment entered or given in the absence of the party against whom it is made. Ordinarily it arises for consideration in consequence of a failure to enter an appearance to defend or where there has been a failure to file a plea. The high court was concerned with the former. It postponed the application for default judgment *sine die* (paragraph 1 of its order). Had the matter ended there, that order could not have been described as one having any of the attributes for appealability laid down in *Zweni*. The order went further however.

[57] In paragraph 2 of its order the high court 'afforded [Absa] an opportunity to provide a notice to the defendant as contemplated in section 129(1) of the National Credit Act of 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'. And, in paragraph 4, which to all intents and purposes is the logical corollary of paragraph 1, the high court granted Absa leave to, in due course, set down the application for default judgment on notice to the defendant. The remaining orders are ancillary orders and thus warrant no independent consideration.

[58] There appear to be strong indicators in the judgment of the high court that the order that it proposed issuing was neither definitive of the rights of the parties nor intended to have the effect of disposing of any portion of the relief claimed in the main action. The high court held:

'[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.

. . . .

[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.

. . . .

[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.'

[59] To my mind paragraph 2 of the order, on which the present debate turns, did not render what would otherwise have been a non-appealable order (paragraph 1), appealable. For, it amounted to no more than a direction from the high court, before the main action could be entered into, as to the manner in which the matter should proceed. Being a preparatory or procedural order that was incidental to the main dispute, it fell into what has been described as the general category of 'interlocutory'. And as Schreiner JA put it in *Pretoria Garrison Institutes v Danish Variety Products (Pty), Limited* 1948 (1) SA 839 (A) at 870:

' . . . [S]ince the decision of this Court in *Globe and Phoenix GM Company v Rhodesian Corporation* (1932 AD 146) the test to be applied has appeared with some certainty, whatever difficulty must inevitably remain in regard to its application. From the judgments of Wessels and Curlewis JJA, the principle emerges that a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to "dispose of any issue or any portion of the issue in the main action or suit" or, which amounts, I think, to the same thing, unless it "irreparably anticipates or precludes some of the relief which would or might be given at the hearing". The earlier judgments were interpreted in that case and a clear indication was given that regard should be had, not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon and in that way affects the decision in the main suit'.

[60] Of the term ‘interlocutory’ Corbett JA stated in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549:

‘In a wide and general sense the term "interlocutory" refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation.’

Corbett JA added:

‘But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper", which do not. . .’

That distinction, according to Harms JA (*Zweni* at 534B-D), is now of little consequence. He explains that ‘the practical implication of s 20(1) is that the real distinction is between a “judgment or order” on the one hand and a decision (conveniently called a “ruling”) which is not. It is no longer necessary or conducive to clear thinking to consider, in this context, whether a decision is a simple interlocutory order’.

[61] In the present case the ‘main suit’ or ‘main action’ is Absa’s claim. An order such as that in paragraph 2 is, I conceive, a ‘preparatory or procedural order’ which does not bear upon or in any way affect the decision in the main action. In *Tropical (Commercial & Industrial) Ltd v Plywood Products Ltd.* 1956 (1) SA 339 (A) at 344 Centlivres CJ held:

'As the order made by the trial Judge "decided no definite application for relief" and was merely a direction as to the manner in which the case should proceed it was not an order in the legal sense, *vide Dickinson's* case, *supra*. Not being an order in the legal sense, it was not an order which fell within the meaning of the words "judgment or order" in sec. 2 *(c)* of the Act.'

In *Dickinson & another v Fischer’s Executors* 1914 AD 424, which is referred to with approval by the learned Chief Justice, Innes CJ stated (at 427):

'But every decision or ruling of a court during the progress of a suit does not amount to an order. That term implies that there must be a distinct application by one of the parties for definite relief. The relief prayed for may be small, as in an application for a discovery order, or it may be of great importance, but the Court must be duly asked to grant some definite and distinct relief, before its

decision upon the matter can properly be called an order. A trial Court is sometimes called upon to decide questions which come up during the progress of a case, but in regard to which its decisions would clearly not be orders. A dispute may arise, for instance, as to the right to begin: the Court decides it, and the hearing proceeds. But that decision, though it may be of considerable practical importance, is not an order from which an appeal could under any circumstance lie, apart from the final decision on the merits.'

[62] In this matter the high court is yet to delve into the merits of the case or pronounce on Absa's entitlement to judgment. That remains for another day. To that end Absa has been granted leave to set down the application for default judgment on notice to the defendant. All that has occurred for the present is that, not being satisfied with the service effected by Absa, the high court has directed that certain further steps be taken. It has not been suggested that those additional steps are so onerous as to bar Absa from obtaining default judgment in due course. In that, Lewis JA and I appear to be at one. For, implicit in my learned colleague's dismissal of Absa's appeal on the merits, seems to me to be an acceptance that Absa can indeed comply with paragraph 2 of the high court's order and in due course move it for judgment.

[63] The order does not amount to a refusal of default judgment, nor does it directly bear upon or dispose of any of the issues in main action, it thus cannot be said that it is tantamount to a dismissal of Absa's action (contra *Durban City Council v Petersen* 1970 (1) SA 720 (N) at 723). It may be that the order of the high court causes Absa some inconvenience but as Harms AJA, with reference to *South Cape Corporation* supra, pointed out (*Zweni* at 533B-C): 'The fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability'.

[64] Accepting that this order is appealable could result in a situation where virtually every refusal to enter default judgment, including those for want of proper service, would be appealable. That 'would indeed open the door to the

“fractional disposal” of actions and the “piecemeal hearing of appeals”’ (*Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983 (4) SA 921 (A) at 928H). In seeking and obtaining leave to appeal to this court, no consideration was given by Absa or the high court as to whether the order was indeed appealable. Thus the fact that the high court granted leave carries the matter no further, since its power to do so arises only in respect of ‘a judgment or order’ within the meaning of that expression. In truth the matter was approached as if an appeal lies against the reasons for judgment. It does not. Rather, an appeal lies against the substantive order made by a court. (*Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.)

[65] It follows in my view that as the order of the high court is not 'a rule or order having the effect of a final judgment' within the meaning of that expression, this court lacks jurisdiction to entertain the appeal. I am thus constrained to hold that the appeal must be struck off the roll with costs.

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V M PONNAN

JUDGE OF APPEAL

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