REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION
DURBAN CASE NO.16103/08

In the matter between

MARIMUTHU MUNIEN Applicant

and

BMW FINANCIAL SERVICES (SA) (PTY) LIMITED First Respondent

SHERIFF, LOWER UMFOLOZI Second Respondent

J U D G M E N T

Delivered on 3 April 2009

WALLIS J.

[1] On 8 March 2006 the applicant entered into an instalment sale agreement with the first respondent in respect of a BMW motor car. In terms of the agreement he was obliged to pay monthly instalments of R4977.56 to the first respondent. The applicant accepts that in about the middle of 2008 he fell into arrears with his repayments. On 6 February 2009 default judgment was granted against him for, *inter alia*, return of the motor vehicle. The summons was served upon the applicant at his chosen *domicilium citandi et executandi.* He claims that he no longer lives at that address and that the summons did not come to his notice. He proposes to seek rescission of the judgment granted against him. In this application he seeks an interdict restraining the first respondent from executing on the judgment it has obtained by repossessing the motor vehicle pending the outcome of his application for rescission.

[2] The applicant maintains that he is entitled to rescission because he did not receive the summons and had a good defence to the claim against him on the basis that the first respondent had not complied with the provisions of section 129(1)(a) of the National Credit Act, 34 of 2005 ("the NCA"). That section provides that if the

consumer is in default under a credit agreement the credit provider 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, alternatively 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. Compliance with that section is mandatory because section 129(1)(b) of the NCA says that the credit provider may not commence any legal proceedings to enforce the agreement without first providing that notice to the consumer.[1] Under section 130(1) the credit provider may approach the court for an order to enforce a credit agreement if the consumer is in default and has been in default for at least twenty business days and at least ten business days have elapsed:

> "… since the credit provider delivered a notice to the consumer as contemplated …in section 129(1) …"

and the consumer has not responded to that notice. Under section 130(3) the court must be satisfied that there has been compliance with the procedures required by section 129.

[3] It is not disputed for the purposes of the present application that the first respondent addressed a notice complying with the requirements of section 129(1)(a) of the NCA to the applicant and that this was posted by registered post to the applicant at his chosen *domicilium*. Nor is it disputed that when no response was received to this initial notice the first respondent sent a further letter to the applicant, by the same means, informing him that in view of his lack of response it had elected to cancel the agreement with him. Thereafter the first respondent commenced the action that led to its obtaining judgment against the applicant.

[4] The basis upon which the applicant contends that there was non-compliance with the provisions of section 129(1)(a) is that he alleges that there is no street delivery of mail at all in the Richards Bay suburbs and accordingly that any notices sent by registered mail to his chosen *domicilium* would not have been delivered by the postal service. I am informed by Mr Combrinck that the first respondent disputes this allegation, but

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[1] Section 129(1)(b) also makes reference to a notice under section 86(10) of the NCA, but that is not the notice relevant to the applicant's situation and it can be disregarded.

for present purposes I must proceed on the basis that it is correct. I should add that in any event even if there had been a postal delivery to that address there is a possibility that the registered letters might not have come to the attention of the applicant inasmuch as he says that he left that address on 15 November 2006 and moved elsewhere in Richards Bay. However, the primary focus of the argument before me fell upon the proposition that letters sent by registered post to street addresses such as that chosen by the applicant as his *domicilium* would not be received because of the absence of a delivery service in that area.

[5] In his founding affidavit the applicant contended that the notice provisions in the NCA require strict compliance. He did not spell out in any detail in what respects he contended that there had been non-compliance but this was dealt with in the argument addressed on his behalf by Mr Voormolen. That argument was that, having regard to the purposes of the NCA; the fact that legal proceedings are impermissible without "first providing to the consumer" the notice referred to and that section 130(1) records that the notice must be "delivered … to the consumer", the requirement in section 129(1)(a) that the credit provider must "draw the default to the notice of the consumer in writing" means that the notice must be received by the consumer or must come to the consumer's attention. As on the allegations of the applicant that did not and could not have occurred, it was contended that there had been non-compliance with section 129(1)(a) and accordingly that the applicant had a good defence to the first respondent's claim.

[6] The argument was presented on the basis that the NCA does not contain any provision such as that embodied in section 5(4) of its predecessor, the Credit Agreements Act 75 of 1980, which provided for the purposes of that Act that an address chosen by the consumer would for all purposes under the Act serve as that person's *domicilium citandi et executandi*.[2] Accordingly it was submitted that on a proper interpretation of the words that I have highlighted in section 129 and 130 the notice had to come to the attention of the applicant.

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[2] See *Marques v Unibank Ltd* 2001 (1) SA 145 (W)

[7] There would be considerable merit in that submission, were the underlying assumption on which the argument was presented correct.[3] But the assumption is incorrect. Mr Combrinck drew attention to the provisions of section 65 of the NCA, which read as follows:

> "65 **Right to Receive Documents**
>
> (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 that document must
>
> (a) make the document available to the consumer through one of more of the following mechanisms –
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> (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;
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> (ii) by fax;
>
> (iii) by e-mail; 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)."

As the NCA does contain provisions dealing with the manner of delivery of documents one must have regard to those provisions in considering whether the notice required by section 129(1)(a) was, for the purposes of the NCA, delivered to the applicant.

[8] Mr Combrinck submitted that the case fell under section 65(1)(a) because the manner of delivering documents to the consumer in terms of the Act has been prescribed in the National Credit Regulations published in GN R489 in the Government Gazette of

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[3] See *Weinbren v Michaelides* 1957 (1) SA 650 (W); *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 (4) SA 994 (A).

31 May 2006, as amended. He referred in this regard to the definition of "delivered" in section 1 of those regulations as meaning:

> "unless otherwise provided for, means sending a document by hand, by fax, by e-mail, or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available, then the recipient's registered address. Where notices or applications are required to be delivered to the National Consumer Tribunal, such delivery shall be done in terms of the Tribunal's Rules. Where notices or applications are required to be delivered to the National Credit Regulator, such delivery shall be done by way of hand, fax, e-mail or registered mail to the registered address of the National Credit Regulator."

Mr Voormolen accepted this contention during argument but it emerged in the preparation of the judgment that it is not necessarily correct. It overlooked the fact that the definition section commences with the words:

> "In these Regulations, any word or expression defined in the Act bears the same meaning as in the Act and …"

Accordingly it appears on this wording that the definition is not seeking to prescribe a method for delivering documents in terms of section 65(1) of the NCA, but is a definition for the purposes of the Regulations themselves. I raised this problem with counsel and received supplementary written submissions from both of them. Mr Voormolen contended that because of this preamble the definition in the regulations is irrelevant and that the matter must be addressed under section 65(2) of the NCA. Mr Combrinck however persisted with the submission that the definition applied.

[9] The argument commences from the fact that this section of the regulations is headed "Interpretation and application of Act". It proceeds on the basis that because the Act is defined in section 1 of the NCA as including the regulations it would be inconsistent for the regulations to prescribe certain methods for delivering documents that differed from those specified in section 65(2) of the Act itself, with the result that documents referred to in the Act could be delivered in one way and documents delivered in terms of the regulations in another. An even stronger point is that there are only a handful of references in the regulations to the word "delivered" or the word "deliver", although the words "provide" and "submit" are used in respect of certain documents. In regulation 24(2) a debt counsellor must deliver a notice to all creditors, but the manner of delivery is specified in regulation 24(5). Regulation 34(1) requires the consumer to deliver a notice in a prescribed form to the credit provider in relation

to the location of goods[4]. Regulation 37 provides for a notice to be delivered but then specifies the manner in which it is to be delivered so that, like regulation 24(2), resort to the definition is unnecessary. Regulation 38(1) seems to be the first one in which the word "delivered" is used in such a way that the definition would apply. Regulation 46 deals with the reasonable costs to deliver a letter of demand. Apart from those 5 references I was unable to find any regulation in which the definition would be relevant. By contrast the NCA itself makes it clear in section 65 that whatever nomenclature may be used in different sections of the Act to describe the giving of notice, wherever a document must be sent to a consumer it must be delivered in the manner set out in that section. There are many instances where that is necessary of which the notice under section 129(1)(a) is one of the most important.

[10] In those circumstances Mr Combrinck argues that whilst the opening wording of the definition section in the regulations may point to the definition of "delivered" being of limited application, when considered in its overall context it is plain that the intention of the Minister was to prescribe modes of delivery in terms of section 65(1) of the NCA. He asks rhetorically, why should the Minister think it necessary to give a definition for the limited purposes of the regulations when the greater need is for modes of delivery to be prescribed for the purposes of the Act itself. He also points out that other expressions not defined in the NCA, such as "auditor" and "debt counsellor" are defined in the regulations but must bear the same meaning in both Act and regulations.

[11] There seems to me to be force in these submissions. Counting against them is that there is no reference to section 65(1) or to the word 'prescribed', but unless the statute requires that there be reference to the empowering provision it is unnecessary for it to be mentioned.[5] Also the form of a definition does not sit entirely comfortably with the

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4 This falls within the definition but outside section 65, which is only concerned with the delivery of notices to a consumer and not the delivery of notices by a consumer.

5 *Howick District Landowners Association v Umngeni Municipality and Others* 2007 (1) SA 206 (SCA) at paras [19] and [20], where Cameron JA (as he then was) said: "Where an empowering statute does not require that the provision in terms of which a power is exercised be expressly specified, the decision-maker need not mention it. Provided moreover that the enabling statute grants the power sought to be exercised, the fact that the decision-maker mentions the wrong provision does not invalidate the legislative or administrative act." See also *Shaikh v Standard Bank of South Africa Ltd and another* 2008 (2) SA 622 (SCA), para 17.

action of prescribing modes of delivery[6], but that is counter-balanced by the heading to this portion of the regulations, where it identifies this section as being relevant to the interpretation of the Act. A further point, so it seems to me, is that in the regulations the Minister requires the stricter form of posting by registered post, rather than posting by ordinary mail that would otherwise be permissible under section 65(2)(a)(i). There seems to be no reason for him to do this in relation to the relatively minor issues under the regulations but not in relation to more important issues such as the giving of notice under section 129(1)(a), where the alternative is that posting by ordinary mail suffices. Overall I think that these factors point in favour of the contention by Mr Combrinck.

[12] My conclusion therefore is that the Minister has prescribed the manner of delivering documents to a consumer in terms of the Act and that the method of delivery must be in accordance with the provisions of the definition of "delivered" in the regulations rather than in terms of section 65(2), although, as I will explain later, I do not think that the result would alter if the latter section applied. For the present the question is whether a notice under section 129(1)(a) is delivered if it is sent by registered post to an address selected by the consumer, irrespective of whether it is capable of being delivered at that address and whether it comes to the attention of the consumer. In my view that question must be answered in the affirmative for the simple reason that this is what the definition of 'delivered' says. It says that a document is delivered where it has been sent by one of four possible methods to the proposed recipient. Those methods are widely divergent, namely, by hand, by registered post, by fax and by e-mail. In each case it is the sending of the document that amounts to delivery not the receipt thereof. That is hardly surprising as in at least two of those cases, namely sending by fax and sending by e-mail, the sender would have no certain means of establishing that the notice had been received, and in the case of posting by registered post a number of matters could intervene to prevent the intended recipient from actually receiving the notice. It would have been relatively easy to formulate a rule that made it clear that the notice had to be received and come to the attention of the consumer, but the Minister chose to say that the "sending" of the document would

[6] There is a possible construction of the opening words of the definition section based on the regulations being part of the Act that it means simply that words defined in the Act shall have the same meaning in the regulations and *vice versa.* Linguistically however it is a somewhat tortuous construction.

mean that it was delivered. It is not possible in my view to give a meaning to this provision that requires receipt by the addressee. That is the case whether the non-receipt is due to the absence of a postal delivery service or the fact that the addressee has moved.

[13] This is not a surprising interpretation as it is consistent with the approach that was taken in the predecessors to the NCA in regard to the giving of notice to a debtor before exercising rights under the contract. The NCA's predecessors both contained provisions similar to those in section 129(1)(a) of the NCA. Originally section 12(b) of the Hire-Purchase Act 36 of 1942 provided that no seller would be entitled to enforce any provision in the agreement for various remedies "unless he has made written demand to the buyer to carry out the obligation in question … and the buyer has failed to comply with such demand". That was held in *Weinbrin v Michaelides, supra,* to require receipt of the notice by the purchaser. The section was, thereafter, amended to read:

> "… unless he has by letter handed over to the buyer or sent by registered post to him at his last known residential business address, may demand to the buyer …"

This amended section was held in *Fitzgerald v Western Agencies*[7] to mean that provided that the notice was handed over or posted by registered post the seller had discharged its statutory obligation. Similarly in *Marques v Unibank Ltd, supra,* the court held that provided the relevant notice under the provisions of the Credit Agreements Act was sent by registered post to the chosen *domicilium* there had been compliance with the statute. The terms of the regulation are therefore consistent with what has gone before in regard to the giving of notice under this type of consumer protection legislation.

[14] I have borne in mind the injunctions in regard to the interpretation of the NCA contained in section 3 thereof. However I do not think that they can operate to alter the plain meaning of the wording in the definition of 'defined'. The question is not so much one of the underlying policy and purpose of the NCA but as to where the balance is to be struck between credit provider and consumer when it comes to the giving of notices under the Act. In the ordinary course the addressee receives a notice

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7 1968 (1) SA 288 (T) at 291

sent by post, fax or e-mail. The person sending the notice has little control over these matters and few means of ensuring that the notice actually comes to the attention of the addressee. Where a postal address is given the consumer is in a position to advise the credit provider if that address changes, but the credit provider who is not so informed has no means of knowing that the consumer has changed their address. Similarly if the consumer gives a postal address it is reasonable for the credit provider to accept that there are mail deliveries at that address. It is the consumer who will know that this is not so. The costs involved in credit providers having to ensure that notices such as those under section 129(1)(a) actually reach the consumer would be substantial and these costs would then have to be borne by the particular consumer or consumers as a body. Bearing all these factors in mind it does not seem to me to be inconsistent with anything in section 3 of the NCA to hold that the credit provider discharges their obligation of delivering notice to the consumer by sending it to the postal address selected by the consumer by registered post, or by fax to a fax number chosen by the consumer, or by e-mail to an e-mail address chosen by the consumer.

[15] That conclusion is fatal to the applicant's contention that because the address chosen by him was not one in respect of which the postal authorities provided a delivery service the section 129(1)(a) notice was not delivered to him. Once delivery is effected by sending the notice, rather than being measured by its receipt, this argument must be rejected as must the more remote argument based merely upon non-receipt. Mr Voormolen placed much reliance on the judgment in *Sowden v ABSA Bank and Others*[8] where Heher J (as he then was) decided that there had not been compliance with Rule 46(3) when a document was sent by registered post to a given street address at which there was no postal delivery. However, with respect, the judgment has not found approval in later cases and it is in any event distinguishable in that the words of Rule 46(3) which were there under consideration, are fundamentally different from the wording and structure of the definition in the regulations[9].

[16] Even if I am wrong in my view that the Minister has by way of the regulations prescribed the manner in which documents are to be delivered under the Act I do not

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8 1996 (3) SA 814 (W)

9 And of section 65(2) which I consider later in the judgment.

think that approaching the matter under section 65(2) avails the applicant. I say so for the following reasons.

[17] That section has two elements. In the first place the credit provider is required to "make the document available to the consumer" through one or more of six specified mechanisms. These are that the document is made available to the consumer at the business premises of the credit provider or is made available to the consumer at some other location designated by the consumer. In the latter case the cost of making the document available must be borne by the consumer. The other four possible mechanisms are by ordinary mail, by fax, by e-mail or by printable web-page.

[18] Once the credit provider has made the document available through one or more of the six possible mechanisms it is then obliged under section 65(2)(b) to deliver it to the consumer in the manner chosen by the consumer from those options. There is no need for the credit provider to make all of these options available to the consumer or indeed to make more than one of them available to the consumer. All that is required is that whichever option or options is made available the consumer must choose the one by which delivery will be made to her or him. In the ordinary course I would expect this to be done in the credit agreement.

[19] That is indeed what happened in the present case. In terms of clause 15(1) of the instalment sale agreement the applicant chose the address at which the summons was served and to which the notices were sent as his *domicilium citandi et executandi.* Clause 15.2 of the agreement provided that:

> "any notice delivered by hand or sent by registered post to Purchaser's *domicilium* shall be deemed to have been received, if delivered by hand, on date of delivery or was sent by registered post, on the third day after date of posting."

[20] Under section 65(2) therefore the proper approach to the present case is that the notice under section 129(1)(a) was sent by registered post to the address chosen by the applicant.[10] The question is then whether the fact that the notice was not received or indeed, that the notice could never have been received because there is no postal

[10] Although the agreement was entered into two days before the NCA was assented to and some three months before its date of commencement the parties were agreed that in the light of section 4(1) of Schedule 3 to the NCA, the agreement falls under the NCA.

service to residences situated in that area, means that the first respondent did not comply with section 129(1)(a). In my view it is apparent from the structure of section 65(2) that the answer to that question must be in the negative. What is required of the credit provider is not simply delivery to the consumer, but delivery "in the manner chosen by the consumer". That language is, I think, only compatible with a situation where the risk of non-receipt of a notice lies with the consumer, who has chosen the method by which the notice is to be made available to them. That is I think clear from the three methods of electronic communication referred to in section 65(2)(a). It is well-known that whilst these may in general be reliable and speedy methods of communication it is not 100% certain that a communication sent by these means will be received. The sender has no mechanism (save perhaps in the case of an e-mail that "bounces" and is returned) of knowing whether the communication has in fact been received, nor would the credit provider be in a position if that was disputed to prove receipt. Yet the onus of proving that notice has been given clearly lies on the credit provider. It could only safely accept the consumer's nomination of these methods of communication if the consumer bore the risk of non-receipt.

[21] The position is I think put beyond doubt by the possibility that the consumer may stipulate for the notice to be made available at a location designated by the consumer at his or her own expense. This may be extremely inconvenient to the credit provider and, whilst it would be entitled to recoup the expense of making the notice available at the designated location, recovery of that expense from a consumer who is already in arrear may be problematic. Were the consumer able to say that notwithstanding the fact the notice was available at that location it had not come to their attention, the position would be intolerable. In my opinion that can never have been the intention of the legislature.

[22] It follows that in my judgment, provided the credit provider delivered the notice in the manner chosen by the consumer in the agreement and such manner was one specified in section 65(2)(a), it is irrelevant whether the notice in fact came to the attention of the consumer. As the consumer has the right to choose the manner in which notice is to be given it is for the consumer to ensure that the method chosen will be one that is reasonably certain to bring any notice to his or her attention. In the present case the applicant was presumably aware of the deficiency in the postal

services at the address chosen in the agreement. He was certainly aware that he had moved. In terms of clause 15.1 of the contract he was perfectly entitled to give notice of that fact to the first respondent and to alter his *domicilium*. He did not do so. His right to alter his address was reinforced by section 96 of the NCA. In addition he was obliged under section 97 of the NCA to inform the first respondent that the location of the motor vehicle had changed, but it does not appear that he did so. The fact that he did not receive either the notices or the summons appears to follow very largely from his own actions rather than those of the first respondent.

[23] I have reached this conclusion on the basis of the language and structure of the NCA. I was not referred to any other judicial decision that pertinently deals with the issues raised in this case. There are, however, a number of decisions under other statutes or rules of court, dealing with provisions in which the manner of serving a notice or document is expressly stipulated. Thus in *Wessels and Another v Brink N O and others*[11] the court had to deal with a rule governing execution that provided that a notice:

> "… shall be served by means of a registered letter, duly prepaid and posted, addressed to the person intended it to be served."

It was held that provided notice was given in that manner, the fact that it was returned by the postal service as undelivered was immaterial.[12]

[24] Lastly, by way of comparison section 19(2)(b) of the Alienation of Land Act 68 of 1981 provides that no seller is entitled to take various steps set out in the section by reason of any breach of contract on the part of the purchaser unless he has by letter notified the purchaser of the breach of contract concerned and may demand to the purchaser to rectify the breach of contract in question and the purchaser has failed to comply with such demand. Section 19(2) provides that:

> "A notice referred to in ss (1) shall be handed to the purchaser or shall be sent to him by registered post to his address referred to in s 23 and shall contain :

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11 1950 (4) SA 352 (T).

12 That judgment was followed in *Standard Bank of SA Ltd and Another v Bundu Te Litho* 1999 (3) SA 979 (C); *Stand 734 Fairland cc v BOE Bank Ltd and Others* 2001 (4) SA 255 (W) and
Ex parte First Rand Bank Ltd t/a FNB Home Loans v Sheriff, Brakpan and Others 2007 (3) SA 194 (W).

(a) …
(b) a demand that the purchaser rectify the alleged breach within a stated period, which, … shall not be less than thirty days calculated from the date on which the notice was handed to the purchaser or sent to him by registered post, as the case may be …"

In *Van Niekerk and Another v Favel and Another*[13] it was held that the requirement of notifying the purchaser of the contract concerned and making demand of the purchaser to rectify the breach of contract was satisfied provided that the letter had in fact been sent to him by registered post, whether or not it was received by the purchaser.[14] Although this decision was overturned on appeal[15] this portion of the judgment was not dealt with or, apparently, challenged.

[25] Of course, none of these cases dealt with a section *in pari materia* with section 65(2) of the NCA. However, overall they do suggest that, generally speaking, when the legislative authority has specifically provided that notices may be given in specific ways specified in the statute or rule, it suffices for the party giving the notice to follow the prescribed procedure and it is irrelevant whether that results in the notice coming to the attention of the party to whom it is addressed. In my view that approach is reinforced in the present case in relation to section 65(2) by the fact that it is for the consumer to choose the method by which the notice is to be given.[16] I accept that the present contract is a standard form of contract of the type described as a contract of adhesion[17] and to that extent the purchaser of a motor vehicle who enters into such a contract has little choice but to accept the mode of delivery of notice provided for in that contract by the first respondent. However if they do not expect that to be an effective means of delivery no doubt the credit provider would accept some other mode. Also, as I have pointed out above, it lay within the applicant's powers to ensure that the first respondent was always apprised on an up-to-date basis of a current address, at which notices, if sent, would be likely to be received by him.

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13 2006 (4) SA 548 (W).

14 Paras [24] and {25]. The judgment followed that in *Marques v Unibank Ltd, supra,* and disapproved the judgment in *Holme v Bardseley* 1984 (1) SA 429)W).

15 *Van Niekerk and Another v Favel and Another* 2008 (3) SA 175 (SCA).

16 I am alive to the fact that the instalment sale agreement in the present case was probably not drafted with the NCA in mind, but the effect of the transitional provisions is that NCA must be applied to it even though that was the case.

17 See the judgment of Sachs J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paras [135] to [138].

The fact that this is a contract of adhesion does not in my view override the clear intention of section 65(2) that it is sufficient for the credit provider to deliver the notice in the manner chosen by the consumer as reflected in their agreement. If that manner of giving notice is followed then the notice will have been delivered irrespective of whether it came to the attention of the consumer.

[26] Mr Voormolen relied on the fact that section 65(2)(a)(i) refers to a notice being sent by ordinary mail whereas the notices in the present case were sent by registered post. However, I do not think that can make any difference. The mechanism for sending the notice remains the postal service and the fact that the letter is registered makes it more, not less, likely to reach its destination. Accordingly I do not think that this is a material departure from the provisions of the section and regard posting by registered post as compliance with its provisions.

[27] In conclusion I am satisfied on both of the grounds dealt with above that the first respondent was entitled to give notice under section 129(1)(a) of the NCA by posting the notice by registered post to the address selected for the purpose of giving notice in terms of the instalment sale agreement. The notice was thereby delivered in terms of the requirements of section 65 of the NCA and that is all that is required by sections 129(1)(a) and 130 of the NCA.

[28] Accordingly the applicant does not have any reasonable prospect of succeeding in his application for the rescission of the judgment granted against him. As I conceive the matter the question whether the applicant has reasonable prospects of success in the rescission application is a question of law and accordingly not one in respect of which one can properly speak of his having a *prima facie* case, albeit open to some doubt. However, if I am wrong in that regard I regard his prospects of success in advancing that case as being slim. Whilst he will undoubtedly be prejudiced if he loses his motor vehicle, the vehicle will depreciate in value and is at risk both in respect of wear and tear and in respect of possible damage, if the first respondent cannot take possession of it in terms of its judgment. The applicant claims to be in a position to pay the arrears and, if his financial circumstances have improved as he claims, no doubt he will be able to make a sensible commercial arrangement with the first respondent. Overall I do not think that the balance of convenience favours him and

therefore if that is an enquiry I am obliged to undertake the combination of a weak prima facie case and the absence of a balance of convenience in his favour, also dictates that the application must fail.

[29] In the result, the application is dismissed with costs.

DATE OF HEARING 27 MARCH 2009

DATE OF JUDGMENT	3 APRIL 2009
APPLICANT'S COUNSEL	MR A V VOORMOLEN
APPLICANTS' ATTORNEYS	DELPORT, DE KONING, EICKER INC
RESPONDENTS' COUNSEL	MR P J. COMBRINCK
RESPONDENTS' ATTORNEYS	J H NICOLSON, STILLER AND GESHEN