Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: **937/2022**
Heard: **20/10/2022**
Delivered: **04/11/2022**

In the matter between:

BRIDGE TAXI FINANCE NO.5 (PTY) LTD Applicant

and

KEITUMETSE SYLVIA MONGALA Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Mamosebo J

[1] This is an application for leave to appeal to the Full Court of this Division against my order refusing to grant default judgment in the unopposed motion court on 22 July 2022. The request for my reasons for refusal dated 5 August 2022 were furnished on 6 September 2022 after the file was only returned to me on 31 August 2022.

[2] In its Notice of Application for Leave to Appeal filed with the Registrar on 16 September 2022, the applicant raised what seems to be about 6 grounds of appeal (A – F) which, in relevant part, and as argued by counsel, Mr Botha, for the applicant, can be categorised in two grounds:

2.1 That the Court erred in finding that the service of the s 129 notice was not appropriate as contemplated in the amended National Credit Act, (NCA) s129(5)(b) thereof*;*

2.2 That the Court erred in not issuing a directive(s) as contemplated in s 130(4)(b).

[3] The test for an application for leave to appeal is trite. In the unreported judgment of *Ramakatsa and Others v African National Congress and Another*[1] the Supreme Court of Appeal remarked:

> *"[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'. I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success*

[1] (724/2019) [2021] ZASCA 31 (31 March 2021) at para 10

postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."

[4] The National Credit Amendment Act amended s 129 of the NCA by adding three subsections to it which provide:

"(5) The notice contemplated in subsection (1)(a) must be delivered to the consumer-
(a) by registered mail; or
(b) to an adult person at the location designated by the consumer.

(6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).

(7) Proof of delivery contemplated in subsection (5) is satisfied by-
(a) written confirmation by the postal office or its authorised agent, of delivery to the relevant post office or postal agency; or
(b) the signature or identifying mark of the recipient contemplated in subsection 5(b)."

[5] It is common cause that the respondent agreed to accept any legal notice in terms of the credit agreement at her *domicilium* at *Enkelkwartiere Kamer No 5, Steyerkraal*. There was no personal service nor was the notice served on the respondent, Ms Mongala, or any adult person residing at her *domicilium* but the sheriff affixed the statutory notice to the main door in that the sheriff was informed by the security guard that '*everybody went away for the long weekend'.* This, however, did not absolve the applicant from having the notice re-served in accordance with the Act.

[6] Inexplicably counsel still argued that the service was proper despite the three new subsections, in line with the *Sebola* judgment[2], making it clear that while actual knowledge of the notice by the consumer is not required, compliance with the two methods of delivery of the notice, namely, by registered mail or in person is required. The subsections further provide for proof of service. In *casu*, proof of proper service in terms of s 129(7)(b) would have been when the recipient signed or placed an identifying mark on the notice. One attempt of effecting service does not justify non-compliance with the required service. Mr Botha, the applicant's counsel, elaborately but irrelevantly dealt with service by registered mail. The respondent made her choice to be served at her *domicilium*.

[7] After default judgment was refused, the applicant sought reasons for refusal which were provided on 06 September 2022. The reasons explained the non-compliance adequately and I deem it unnecessary to repeat them in this application. The reasons furnished have effectively dealt with the aspect of the required directive in terms of s 130 because they highlight the purpose of s 129 against the backdrop of the sheriff's return.

[8] Mr Botha relied on three Constitutional Court cases: *Sebola*, *Kubyana*[3] and *Baliso*[4] in his contention that affixing a notice to the door was appropriate. Counsel further asked a rhetorical question why the legislator would allow a summons to be served by affixing and not the s 129 notice. Courts do not legislate, they interpret. Unlike in the case before me, Mr and Mrs Sebola chose their mortgaged property as the address where notices and processes 'in any legal proceedings' should be served. However, they also

[2]Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC)

[3]Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC)

[4]Baliso v Firstrand Bank Ltd t/a Wesbank 2017 (1) SA 292 (CC)

provided a post office box where the documents may be deposited or delivered. Cameron J, writing for the majority, said the following in *Sebola*[5]:

> *"[45] Section 129(1)(a) requires a credit provider, before commencing any legal proceedings to enforce a credit agreement, to draw the default to the notice of the consumer in writing. It has been described as a 'gateway' provision, or a 'new pre-litigation layer to the enforcement process'. Although s 129(1)(a) says the credit provider 'may' draw the consumer's default to his or her notice, s 129(1)(b)(i) precludes the commencement of legal proceedings unless notice is first given. So, in effect, the notice is compulsory."*

[9] In *Kubyana,* the mode of service was by registered mail. Although the Court process was mailed to the correct post office Mr Kubyana failed to collect his mail. Court held that the bank in Kubyana had complied with the statutory requirements and was entitled to obtain judgment.

[10] The issue in *Baliso* pertained to the appealability of an exception. The bank alleged that it caused a s 127(2) notice to be sent to the applicant. The Constitutional Court found that the question whether the consumer received the s 127(2) notice or not or whether it probably came to the attention of a reasonable consumer must be determined by way of evidence at a trial. It found the exception procedure inappropriate in the circumstances. Leave to appeal was refused. The three Concourt cases do not support the applicant's contention regarding service.

[11] The applicant contends that this Court made an error in not granting directions to counsel as contemplated in s 130(4) which essentially states that if the credit provider has not complied with s 129(1) it must in terms of s 30(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may

[5] Ibid at para 45

be resumed. These alleged shortcomings were dealt with in court hence the refusal to grant the order.

[12] In the circumstances the question that remains to be answered is whether the order granted is appealable or not.

[13] In *Baliso*[6], although the Constitutional Court was dealing with appealability of an exception, the principle is relevant:

> *"[5] The first hurdle facing the applicant is procedural in nature. The disposal of exceptions on appeal presents particular problems in relation to the attributes of an appealable judicial decision. In Zweni, the Supreme Court of Appeal canvassed different rationales distinguishing between non-appealable rulings and appealable orders. Harms AJA, writing for the court, noted that,* ***in determining in which category a judicial determination falls, one must look 'not merely [at] the form of the [judicial pronouncement] but also, and predominantly, [at] its effect'****. He then enumerated three attributes that an appealable judgment has:*
>
> ***'(F)irst, the decision must be final in effect and not susceptible of alteration by the Court of first instance; 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****.'" (Own emphasis)*

[14] At the risk of repetition, the sheriff did not serve the s 129 notice as contemplated in the amended s 129. It is clear that affixing it to the door is excluded by the amended provisions of the NCA. The order refusing default judgment under these circumstances is not appealable because it has no final effect. The applicant needs to comply with the procedural aspect of re-serving the s 129 notice properly, if so advised, before bringing an application for default judgment again.

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[6] Ibid at para 5

[15] I have carefully and dispassionately considered the application for leave to appeal in an effort to determine whether there are reasonable prospects that another court would come to a different finding than this court reached and have not found any. I am also of the view that there is no compelling reason to entertain the appeal. In the result, the application for leave to appeal stands to fail.

[16] The following order is made:

The application for leave to appeal is dismissed with costs.

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M.C. MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the Applicant:	Adv. JG Botha
Instructed by:	Roux, Welgemoed & Du Plooy Attorneys
For the Respondent:	No appearance