CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 150/15

In the matter between:

MLAMLI BALISO Applicant

and

FIRSTRAND BANK LIMITED t/a WESBANK Respondent

Neutral citation:	*Baliso v Firstrand Bank Limited t/a Wesbank* [2016] ZACC 23
Coram:	Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J, and Zondo J
Judgments:	Froneman J (first): [1] to [37] Zondo J (second): [38] to [80]
Heard on:	08 March 2016
Decided on:	04 August 2016
Summary:	credit agreement — instalment agreement — compliance — jurisdictional requirement — section 127 of the National Credit Act — exception — probable receipt by the reasonable consumer in opposed matters determined by way of evidence at the trial — appealability of a dismissal of an exception — *Zweni* requirements — leave for appeal refused

ORDER

The following order is made:

The application for leave to appeal is dismissed.

JUDGMENT

FRONEMAN J: (Moseneke DCJ, Cameron J, Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurring)

[1] Section 130(3)(a) of the National Credit Act[1] (Act) permits a court to determine a matter in respect of a credit agreement to which the Act applies only if it is satisfied that, in cases to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with. This case involves the requirements of section 127(2).

[2] The respondent (Bank) instituted action against the applicant in the Western Cape Division of the High Court, Cape Town (High Court) for payment of an amount of R224 880.27 allegedly outstanding in terms of a credit agreement under the Act. In its particulars of claim, the Bank alleged that it caused a notice in terms of section 127(2) of the Act to be sent to the applicant and attached a copy of the notice to the particulars of claim. After filing a plea that contained an allegation that the notice was sent by ordinary mail only, the applicant also filed an exception to the claim, as lacking averments necessary to sustain an action.

[1] 34 of 2005.

[3] The High Court granted condonation for the late filing of the exception, but then dismissed the exception. Leave to appeal was refused. The applicant now seeks leave to appeal to this Court. The Bank has not filed any papers in opposition.

Leave to appeal

[4] The applicant seeks to challenge the manner in which the High Court dealt with his exception. He argues that the High Court erred in dismissing his exception and in refusing to order the stay of the matter.

[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.[2] In *Zweni*, the Supreme Court of Appeal canvassed different rationales distinguishing between non-appealable rulings and appealable orders. Harms JA, 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".[3] 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."[4]

[6] In *Hamilton*, Cameron JA noted the difference in the Supreme Court of Appeal[5] authority between the appealability of decisions upholding exceptions and the apparent inconsistency in deciding the appealability of decisions dismissing

---

[2] See *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) and *Minister of Safety and Security and Another v Hamilton* [2002] ZASCA 22; 2001 (3) SA 50 (SCA) (*Hamilton*).

[3] *Zweni*, above n 2, quoting *South African Motor Industry Employers' Association v South African Bank of Athens* 1980 (3) SA 91 (A) at 96H.

[4] Id at 532J-533A.

[5] And previous Appellate Division cases.

exceptions.[6] In the particular circumstances of that case the Supreme Court of Appeal declined to overrule the decisions that held that the dismissal of an exception is not appealable.[7]

[7] In this Court, the principles applicable to the appealability of decisions were comprehensively dealt with by Moseneke DCJ in *ITAC*:[8]

> "The question whether an appeal against a decision of the High Court may lie directly to this Court is governed by section 167(6)(b) of the Constitution read with rule 19. The constitutionally prescribed standard is whether it is in the interests of justice for this Court to hear an appeal. In *Khumalo and Others v Holomisa* this Court held that it is not a jurisdictional requirement for an appeal to this Court that the matter must involve a 'judgment or order' within the meaning of section 20(1) of the Supreme Court Act. However, the Court pointed out that it will not often be in the interests of justice for this Court to entertain appeals against interlocutory rulings which do not have a final effect on the dispute between the parties.
>
> The same point was made again in *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* (*TAC(1)*):
>
> > 'The policy considerations that underlie the non-appealability of interim execution orders in terms of section 20 of the Supreme Court Act, are also relevant to the decision whether it is in the interests of justice to grant an application for leave to appeal to this Court against an interim execution order.'
>
> In this sense, the jurisprudence of the Supreme Court of Appeal on whether a 'judgment or order' is appealable remains an important consideration in assessing where the interests of justice lie. An authoritative restatement of the jurisprudence is to be found in *Zweni* which has laid down that the decision must be final in effect and not open to alteration by the court of first instance; it must be definitive of the rights

[6] *Hamilton* above n 2 at paras 5-7.

[7] Id at para 8.

[8] *International Trade Administration Commission v Scaw SA (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (*ITAC*). See also *Director-General Department of Home Affairs and Another v Mukhamadiva* [2013] ZACC 47; 2014 (3) BCLR 306 (CC) at para 19.

> of the parties; and lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. On these general principles the Supreme Court of Appeal has often held that the grant of an interim interdict is not susceptible to an appeal.
>
> The 'policy considerations' that underlie these principles are self-evident. Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court *a quo* when final relief is determined."[9] (Footnotes omitted.)

[8] In the present matter, the applicant sought to circumvent the potential problem of appealing against the dismissal of an exception by couching his application for leave as one against that part of the judgment in the High Court where he alleges it wrongly made a distinction between the requirements of section 127(2) and section 129(1) of the Act. But this does not help him. Appeals are against the decisions of courts, not the reasons for the decisions.[10] So the appeal is inevitably in the end against the dismissal of the exception, no matter the sophistry.

[9] The essential ground for the exception was that the respondent's particulars of claim did not comply with the requirements set out in *Sebola*[11] for notice under section 129(1) of the Act. The argument was that the notice required under section 127(2) of the Act was as important, if not more so, than notice under section 129(1). The High Court disagreed and dismissed the exception. Before us the applicant contended that the High Court erred.

[10] The legal issues of whether the requirements for pleading in respect of notices under sections 127(2)(a) and 129(1) of the Act should be the same and what effect the determination of that will have on the appealability of the dismissal of the exception

[9] *ITAC* above n 8 at paras 47-50.

[10] *SA Reserve Bank v Khumalo* [2010] ZASCA 53; 2010 (5) SA 449 (SCA) at para 4.

[11] *Sebola and Another v Standard Bank of SA Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (*Sebola*).

are intertwined. It will be necessary to determine the former in order to see whether the *Zweni* requirements of a judgment, namely that it is final in effect and not open to change by a court of first instance; definitive of the rights of the parties; and dispositive of a substantial portion of the relief sought in the main proceedings, are met. If they are, the dismissal of the exception will be appealable. If they are not, one will need some further justification, based on the interests of justice, in order to grant leave to appeal.

[11] It is important to recognise, at the outset, what the purpose of compliance with the relevant notices in terms of section 130(3)(a) is. Compliance is a prerequisite for "determin[ing] the matter".[12] When is a matter "determined" in proceedings under the Act? That depends on whether the matter is unopposed and default judgment is sought, or whether it is opposed and judgment is to follow only upon hearing evidence at a trial.

[12] In terms of our civil procedure, default judgment for a debt or liquidated demand is granted on an acceptance of the allegations as set out in the summons, without any evidence. Where the claim is not for a debt or liquidated demand, the court may, after hearing evidence, grant judgment. This is usually only evidence on the amount of unliquidated damages.[13] The reason for not hearing evidence on the other factual allegations made in the summons or particulars of claim is that, because the claim is not opposed, it may be accepted that those allegations are admitted or not disputed.

---

[12] Section 130(3) reads in relevant part:

> "Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that
>
> (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with."

[13] See rule 31(2)(a) of the Uniform Rules of Court. See also rule 12(4) of the Magistrates' Court Rules and Harms and Southwood *Judgment by Default* (LexisNexis, Cape Town 2015) at B 12(8).

[13] *Sebola,*[14] in its own terms and as clarified in *Kubyana,*[15] dealt with legal proceedings at the default judgment stage. Apart from its interpretation of the notice requirements contained in section 129 of the Act, *Sebola* accepted that the general underlying principle was that probable proof of compliance with the notice requirements was needed before the matter could be determined.[16]

[14] In that context it was stated:

> "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 section 129 notice in terms of section 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."[17]

[15] In *Kubyana*, the applicant sought to make much of the phrase "in the absence of contrary indication" in support of his argument that section 129(1)(a)(i) should be

---

[14] Above n 11 at para 7.

[15] *Kubyana v Standard Bank of SA Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 42.

[16] See *Sebola* above n 11 at para 74, where the Court stated:

> "But given the high significance of the section 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."

At para 75 the Court stated further:

> "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 section 129(1)."

[17] Id at paras 77-8.

interpreted to require that notice must be brought to the subjective attention of the consumer. This argument was rejected.[18] In his judgment, Jafta J stated:

> "The determination of the facts that would constitute adequate proof of delivery of a notice in a particular case must be left to the court before which the proceedings are launched. It is that court which must be satisfied that section 129 has been followed. Therefore, it is not prudent to lay down a general principle save to state that a credit provider must place before the court facts which show that the notice, on a balance of probabilities, has reached a consumer. This is what *Sebola* must be understood to state."[19]

[16] *Kubyana* was not a default judgment matter. It was an opposed matter where the applicant had the opportunity to give evidence to contradict the evidence of proper notice led by the Bank. He elected not to do so. In her judgment, Mhlantla AJ (as she then was) explained the effect of a properly-pleaded notice in a contested matter:

> "Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her

[18] *Kubyana* above n 15 at para 52:

> "Mr Kubyana's argument is also based on a misreading of *Sebola*. The 'contrary indication' requirement applies to two inferences that a court may make: the inference that the notification from the Post Office (indicating that a registered item is available for collection) reached the consumer and the inference that a reasonable consumer would have responded to that notification and retrieved the notice. The first inference is based on the reasonable assumption that when a credit provider has dispatched a notice by means of registered post, has specified the correct address for the consumer and has ensured that the notice is delivered to the correct branch of the Post Office, the notification calling on the consumer to collect a registered item will be delivered to her address. A contrary indication would be a factor showing that, in the circumstances and despite the credit provider's efforts, the notification did not reach the consumer's designated address. The second inference is based on the assumption that a consumer acting reasonably would, having received the notification from the Post Office to retrieve a registered item, proceed to collect the notice. In these circumstances a contrary indication would be a factor showing that the consumer acted reasonably in failing to collect or attend to the notice, despite the delivery of the notification to her address."

[19] Id at para 98.

attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour."[20]

[17] On the facts, Mr Kubyana failed to provide evidence to displace the burden of proper notice. As Mhlantla AJ noted:

"It is sufficient to bring the section 129 notice to a consumer's attention for that consumer to have agreed to receive the notice by way of registered mail and then to receive a notification that a registered item is awaiting her attention. This is the case unless a reasonable consumer would not, in the circumstances, have taken receipt of the notice.

But this defence cannot avail Mr Kubyana, for he elected neither to testify nor to provide an explanation for why he did not respond to the notifications from the Post Office. That being the case, there is no basis upon which we can determine that, notwithstanding Standard Bank's efforts, it was reasonable for Mr Kubyana not to have taken receipt of the section 129 notice. And it must be remembered that the defence is a narrow one: it would apply only if Mr Kubyana were able to prove that, despite the credit provider's attempts at delivery, a reasonable consumer in his position would not have collected the notice or responded to it. In the result, Standard Bank did all that was required of it by the Act. To hold it to a higher standard would be to impose an excessively onerous standard of performance."[21]

[18] The judgment of Jafta J is to similar effect:

"The facts are set out in detail in the main judgment. On 16 July 2010 Standard Bank sent a section 129 notice by registered mail to Mr Kubyana. The notice reached his

[20] Id at para 53.

[21] Id at paras 56-7.

> local Post Office which, in turn, sent out a notification to the address nominated by him as his domicilium. The first notification was sent to his address on 20 July 2010 but he failed to collect the registered mail. Seven days later, a second notification was dispatched to his address. Again he failed to collect the mail. On 1 September 2010 the notice was returned to the Bank.
>
> Mr Kubyana did not contest the correctness of these facts by way of evidence in the High Court. That Court approached the matter on the footing that Mr Kubyana received notification of the registered mail but failed to collect it. The Court held that there was compliance with the relevant provisions.
>
> Mr Kubyana's failure to testify and explain why he did not collect the notice drives one to the inescapable conclusion that he deliberately failed to collect it. He cannot be allowed to frustrate the objects of the Act. The relevant provisions were enacted to protect honest consumers who, for some reason, find themselves in dire financial straits."[22]

[19] Like *Kubyana*, this case is not a default judgment matter. The applicant was allowed to raise the exception at a very late stage, after delivery of his plea. Whatever the outcome of the exception, he is in a position to provide evidence at the trial that he was not given proper notice in terms of section 127(2) of the Act. After hearing evidence from both parties, the presiding judicial officer would then have to assess this evidence in order to decide whether proper notice was given.

[20] It follows that none of the *Zweni* requirements have been met. The dismissal of the exception in the High Court (i) is not final in its effect; (ii) is not definitive of the rights of the parties; (iii) nor is it dispositive of any substantial portion of the relief sought in the main proceedings. The applicant may raise and substantiate any of his defences in relation to the requirements of section 127(2) and 130(3) by way of pleading and leading evidence at the trial. If the *Zweni* test told the whole story, leave to appeal would have to be refused for lack of an appealable decision.

[22] Id at paras 86-8.

[21] Are there, nevertheless, interests of justice considerations that would necessitate granting leave and hearing the appeal?

[22] The applicant argued that it was illogical to make a distinction between the manner of giving notice under section 127(2) of the Act, and that required under section 129(1), as the High Court did. He acknowledged that section 129(1)(a) served a different purpose to that of section 127(2), but submitted that the failure to comply with the latter had even more serious consequences for the consumer than the former. There is much force in this.

[23] Failure to comply with section 129(1) has only dilatory consequences. The purpose of a notice under section 129(1) is to ensure that proper efforts are made to allow a defaulting consumer to pay off the outstanding debt by way of non-judicial processes. Improper notice only results in the court process being postponed until these extra-judicial court processes are followed and still prove futile or inconclusive.[23]

[24] Failure to comply with the section 127(2) notice requirement also has the same dilatory consequences, but it has a more serious effect as well.

[25] The section 127(2) notice follows upon the termination, by notice, of the relevant credit agreement by the consumer and the surrender of the goods to the credit provider.[24] Within 10 business days of receiving the notice or the tendered goods, the credit provider must give the consumer the requisite notice under section 127(2)(b) "setting out the estimated value of the goods and any other prescribed information".[25] This gives the consumer a choice, a second bite at the cherry as it were. She may,

[23] Section 130(4) of the Act.

[24] Section 127(1) of the Act.

[25] Section 127(2)(b) provides:

> "Within 10 business days after the later of receiving goods in terms of subsection (l)(b)(ii), a credit provider must give the consumer written notice setting out the estimated value of the goods and any other prescribed information."

again within 10 business days, unconditionally withdraw the notice to terminate the agreement and resume possession of the surrendered goods, as long as she is not in default under the credit agreement.[26]

[26] If she chooses not to respond, the credit provider must sell the surrendered goods as soon as practicably possible, at the best reasonable price obtainable.[27] Making due and reasonable allowance for its expenses relating to this sale of the goods, a credit provider must either credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale of the goods.[28] Depending on whether the proceeds of the sale exceeds, or is less than, the settlement value of the goods immediately before the sale, a consumer may then either receive the excess or be called upon to refund the shortfall.[29]

[27] The section 127(2) notice setting out the estimated value of the goods thus provides the consumer with vital information about whether she is likely to benefit from the sale of the goods, or will still be liable for payment of some money to the credit provider after the sale. Without proper notice the consumer is deprived of the opportunity of making the choice of whether to withdraw the termination of the agreement. But it works to the detriment of the credit provider too. If no proper notice is given, the provisions allowing for the sale of the goods become inoperative and the credit provider's claim for repayment of outstanding monies in the case of a shortfall on the settlement value of the goods will fail. If a sale follows upon an invalid notice, a credit provider risks losing its claim for repayment of outstanding monies. Put differently, an invalid notice to the consumer may provide a consumer with substantive, not only dilatory, grounds to resist repayment under those circumstances.[30] Given these serious consequences of non-compliance with the notice

[26] Id section 127(3) and 127(4)(a).

[27] Id section 127(4)(b).

[28] Id section 127(5).

[29] Id section 127(6)-(9).

[30] Section 130(3)(a) provides that "the court may determine the matter" only if the court is satisfied that the necessary procedures have been complied with. If not, the court must adjourn the matter and "make an

required under section 127(2), there is merit in the submission that there exists no good reason to differentiate materially between the method of complying with the section 127(2) notice requirement and that under section 129(1)(a)(i).

[28] *Sebola* and *Kubyana* established that, in respect of a notice under section 129(1)(b)(i), proof that the notice would probably have come to the attention of a reasonable consumer is required.[31] The applicant, however, contended that, read in context, actual proof of receipt of the section 127(2) notice by the consumer is required under the Act.

[29] Section 127(3), which gives the consumer the vitally important choice to unilaterally withdraw her earlier termination of the credit agreement, provides that this step may be taken "after *receiving* a notice under subsection (2)".[32] But the purpose of making her aware of the choice of withdrawal would also be achieved if the notice and its content come to her attention without actual receipt. Adapted to the purpose of section 127, what is required before a court may determine the matter is proof that the section 127(2) notice was probably received by, or came to the attention of, a reasonable consumer. The qualification of "a reasonable consumer" is necessary for the same reasons as set out in *Kubyana*, namely, to prevent consumers from unreasonably frustrating compliance with the section.[33]

[30] Is this clarification of what is required by way of proof of compliance in relation to the notice requirement under sections 127(2) and 129(1)(a)(i) respectively, sufficient reason to entertain the appeal? I think not.

---

appropriate order setting out the steps the credit provider must complete before the matter may be resumed". See section 130(4)(b). A postponement and accompanying order may, however, not be able to put the Humpty Dumpty of a claim under the Act together again.

[31] *Kubyana* above n 15 at paras 55 and 81-3.

[32] Emphasis added.

[33] *Kubyana* above n 15 at paras 39-40, 46-8, 51, 53 and 83.

[31] Because this is an opposed matter, not an unopposed application for default judgment, the outcome either way of the exception will have no final effect on the issues between the parties. Even if the exception is upheld, the respondent will have the opportunity to amend its particulars of claim.[34]

[32] The applicant excepted to the particulars of claim on the basis that it should have contained allegations of notice by registered mail in a manner similar to those referred to in *Sebola*, after he had already filed a plea alleging that the notice was sent by ordinary mail. This procedure was misconceived. *Sebola* sought to prevent possible injustice to consumers who did not oppose claims. It did this by providing guidance on how courts should ensure that sufficient allegations are contained in unopposed claims under the Act where default judgment is sought, to prevent possible injustice to consumers who did not oppose the claims. As explained in *Kubyana*, the guidance provided in *Sebola* is restricted to unopposed matters where default judgment is sought and is not exhaustive of the manner in which notice can probably be brought to the attention of a reasonable consumer.[35] A summons may well be excipiable if it does not meet the *Sebola / Kubyana* standard, but it is not necessary to make a definitive holding in this regard. The issue here is the appealability of a dismissal of an exception.

[33] In addition, there are few or no prospects of success that the exception in its present form can possibly succeed. The factual basis upon which the applicant relies for his exception is that the notice was sent by ordinary mail. The respondent's particulars of claim make no allegation that the notice was sent by ordinary mail.[36] Where an exception is taken a court looks only to the pleading excepted to as it stands,

[34] *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (3) SA 193 (CC); 2015 (2) BCLR 127 (CC) at para 79.

[35] See *Kubyana* above n 15 at paras 49-53.

[36] In paragraph 14 of the particulars of claim the respondent pleads that "[t]hereafter the Plaintiff caused a notice in terms of Section 127(2) of the National Credit Act to be sent to the Defendant, a copy of which is annexed hereto as ANNEXURE 'E'." Annexure E is a copy of the notice without any indication on it that it was sent by ordinary mail.

not to facts outside those stated in it.[37] The only allegation about notice by ordinary mail is in the applicant's own plea and as an averment in his notice of exception and an affidavit filed simultaneously with it. Those allegations may not be used as the basis for deciding the exception.

[34] Here, the question of probable receipt of the section 127(2) notice, or of it probably coming to the attention of the reasonable consumer, in this case the applicant, is one of the issues that must be determined by way of evidence at the trial. The exception procedure was inappropriate in the circumstances. Leave to appeal must be refused.

[35] After completion of this judgment I had the privilege of reading the judgment of Zondo J. I nevertheless remain unpersuaded that the appeal can succeed.

[36] The matter was treated by the parties and the Judge in the High Court as an exception, not as an application to be decided on affidavit. I fail to see how a court on appeal is entitled to treat it otherwise; make a declaratory order and then summarily dismiss the respondent's action with costs. Even if it was an exception to jurisdiction that should have been upheld, the proper order would still have been to allow the respondent the opportunity to amend its particulars of claim, not to make a final order dismissing the respondent's action.[38] This merely illustrates the importance of keeping the distinction between the form of proceedings, unopposed or opposed, in mind, as shown above. This is an opposed matter, similar to *Kubyana*, where the applicant is in the position to give evidence whether he received the notice or not. And if he did receive it in time, even if it was only sent by ordinary mail, could he still ask for dismissal of the respondent's claim? Surely not.

[37] See *Hamilton* above n 2 at para 5 and Erasmus *Superior Court Practice* 2 ed (Juta & Co Ltd, Cape Town 2015) at D1-293, 294.

[38] *H v Fetal Assessment Centre* above n 34.

Order

[37] The following order is made:

The application for leave to appeal is dismissed.

ZONDO J (Mogoeng CJ, Bosielo AJ and Jafta J concurring)

Introduction

[38] This is an application for leave to appeal against a decision of the Western Cape Division of the High Court (High Court). That decision was to the effect that, by sending a notice in terms of section 127(2) the Act[39] to the applicant by ordinary mail, the respondent had complied with the requirements of that provision. It also dismissed the applicant's exception to the respondent's action.

Background

[39] The respondent instituted an action in the High Court against the applicant for payment of R224 880.27. Previously, the respondent and the applicant had concluded an instalment agreement in terms of which the respondent provided credit to the applicant for the purchase of a Mercedes Benz motor vehicle. The applicant was obliged to repay the loan by way of monthly instalments.

[40] In its particulars of claim the respondent alleged that it repossessed the motor vehicle from the applicant and sold it on auction after the applicant had fallen into arrears. The respondent alleged that the amount of R224 880.27 represented the difference between the value of the motor vehicle at the time it was returned and the price for which it was sold. The action was for the recovery of the shortfall. The applicant delivered his plea to the respondent's action. Thereafter, he delivered an exception that was accompanied by an affidavit deposed to by him. The High Court

[39] See above n 1.

condoned the applicant's delivery of an exception after he had already delivered his plea.

[41] The respondent did not deliver any affidavit to dispute the contents of that affidavit. It also did not bring an application to strike the affidavit out or an application for an order declaring the delivery of that affidavit an irregular step. There is no indication anywhere in the record or in the judgment of the High Court that the respondent had any objection to the delivery of the applicant's affidavit. The fact that that affidavit was not struck out or that its delivery was not declared an irregular step meant that the Court was obliged to take its contents into account in deciding the matter. It could not simply ignore an affidavit placed before it containing evidence relevant to the issue it was called upon to decide. The defence advanced by the applicant in his plea was that the respondent had not complied with section 127(2).

Jurisdiction

[42] As this matter raises the interpretation, application and the effect of provisions of the Act, this Court has jurisdiction.[40]

Leave

[43] In this Court leave to appeal is granted if it is in the interests of justice to grant leave. I have had the benefit of reading the judgment by my Colleague, Froneman J (the first judgment). The first judgment first examines the question whether the decision sought to be appealed against is appealable.[41] It concludes that the decision is not appealable.[42] Then it considers whether it is, nevertheless, in the interests of justice to grant leave to appeal.[43] It concludes that it is not. It then decides that the application should be dismissed.[44]

[40] See *Sebola* above n 11 and *Kubyana* above n 15.

[41] See [5] to [10] of the first judgment.

[42] See [20] of the first judgment.

[43] See [21] of the first judgment.

[44] See [33] to [34] of the first judgment.

[44] The main reason advanced in the first judgment in support of the dismissal of the application for leave to appeal is that the decision sought to be appealed against is an interlocutory order that is not final in effect nor dispositive of a substantial part of the main action. For this the first judgment relies upon the decision in *Zweni*.[45] The first judgment takes the view that the High Court may still alter its decision at trial. Accordingly, the first judgment's dismissal of the application is on the basis that the matter should proceed to trial and the trial court will decide whether or not it alters the decision.

[45] I am unable to agree with the first judgment on the conclusions and order referred to above. The question raised by this matter is whether or not the sending of a section 127(2) notice by a credit provider to a consumer by ordinary mail constitutes compliance with section 127(2). That is an important question of law that has not been considered by this Court. A decision on this issue will affect the entire credit market industry. Both credit providers and consumers would be interested to know whether a credit provider who sends a section 127(2) notice to a consumer by ordinary mail complies with section 127(2). They would also want to have certainty on what the effect is of a conclusion by a court that there has been no compliance with section 127(2) where the credit provider has already sold the goods which were the subject of the credit agreement. One of the questions that arises is whether, in such a case, the credit provider may still pursue its action against the consumer to recover the shortfall contemplated in section 127(8) of the Act.

[46] Furthermore, in my view the decision sought to be appealed against relates to the jurisdiction or competence of the High Court to determine the matter before it and, as such, is appealable. The fact that the decision is appealable would support the conclusion that it is in the interests of justice that leave should be granted. If this Court entertains this matter and concludes that there was no compliance with the procedure in section 127(2), that may be fatal to the respondent's main action in the

[45] *Zweni* above n 2.

light of the fact that the motor vehicle has already been sold. As will be shown below, the applicant has reasonable prospects of success. In my view, it is in the interests of justice that leave to appeal be granted.

The appeal

[47] In his exception as well as affidavit the applicant objected to the respondent's action. His objection was two-fold. The first part was that the respondent's particulars of claim did not contain certain allegations that they were required to contain in order to sustain the action. The second part was that the respondent had not complied with section 127(2) and, therefore, the Court could not determine the matter. As will be shown shortly, if valid, the second part of the objection meant that the Court did not have the competence or jurisdiction to determine the matter. In this judgment I focus on the second part of the objection.

[48] A reading of the High Court's judgment reveals that the High Court appreciated that part of the applicant's objection was that there had been no compliance with section 127(2). That is why it defined the issue for determination thus:

> "In this instance the exception is limited to the question whether it was sufficient for the plaintiff to deliver the section 127(2)(b) notice by ordinary mail."[46]

Later, the Court said:

> "Section 130(3)(a) of the NCA specifically provides that the court may only determine a matter in respect of proceedings to which section 127 of the NCA applies, if the procedures required by section 127 have been complied with. In section 130(4)(b) it is furthermore stipulated that, in the event of credit provider not having complied with the provisions of the NCA as contemplated in section

[46] Firstrand Bank Ltd t/a Wesbank v Baliso [2015] ZAWCHC 146 (High Court judgment) at para 18.

130(3)(a), the court must adjourn the matter and make an appropriate order setting out the steps that the credit provider must take before the matter may be resumed."[47]

The High Court concluded:

"I conclude that the section 127(2)(b) notice forwarded by the plaintiff to the defendant by ordinary mail was sufficient. *The plaintiff therefore complied with the provisions of the NCA and there is no basis for the matter to be postponed*."[48]

Thereafter, the Court dismissed the applicant's exception and refused to postpone the matter in terms of section 130(4)(b).

[49] From the above it is clear that the decision made by the High Court was that the sending of a section 127(2) notice by ordinary mail is sufficient for purposes of compliance with section 127(2) and that, therefore, there was compliance with the procedure prescribed by section 127 before the respondent instituted its action.

The effect of the decision of the High Court

[50] The next question to consider is what the effect of the High Court's decision was. In particular, what is the effect of the decision of a court that a credit provider has complied with section 127(2)? That question requires an examination of both sections 127 and 130(3) and (4). Section 127(1) – (4) reads:

"(1) A consumer under an instalment agreement, secured loan or lease—

(a) may give written notice to the credit provider to terminate the agreement; and

(b) if—

(i) the goods are in the credit provider's possession, require the credit provider to sell the goods; or

(ii) otherwise, return the goods that are the subject of that agreement to the credit provider's place of business during

[47] Id at para 19.

[48] Id at para 20.

ordinary business hours within five business days after the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider.

(2) Within 10 business days after the later of—

(a) receiving a notice in terms of subsection (l)(b)(i); or

(b) receiving goods tendered in terms of subsection (l)(b)(ii),

a credit provider must give the consumer written notice setting out the estimated value of the goods and any other prescribed information.

(3) Within 10 business days after receiving a notice under subsection (2), the consumer may unconditionally withdraw the notice to terminate the agreement in terms of subsection (l)(a), and resume possession of any goods that are in the credit provider's possession, unless the consumer is in default under the credit agreement.

(4) If the consumer–

(a) responds to a notice as contemplated in subsection (3), the credit provider must return the goods to the consumer unless the consumer is in default under the credit agreement; or

(b) does not respond to a notice as contemplated in subsection (3), the credit provider must sell the goods as soon as practicable for the best price reasonably obtainable."

Section 127(3) confers upon the consumer, if she is not in default under the agreement, the right to unconditionally withdraw the notice to terminate the agreement and resume possession of the goods within 10 business days after receiving the section 127(2) notice. In this case there was a dispute between the parties on whether the applicant was in default. However, even if the applicant was in default, that would not affect the ultimate conclusion.

[51] Section 127(5) obliges the credit provider to take certain steps "[a]fter selling any goods *in terms of this section* . . .". The steps that the credit provider must take under paragraphs (a) and (b) are, respectively, to—

"(a) credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the credit provider in connection with the sale of the goods; and

(b) give the consumer a written notice stating the following:

(i) The settlement value of the agreement immediately before the sale;

(ii) the gross amount realised on the sale;

(iii) the net proceeds of the sale after deducting the credit provider's permitted default charges, if applicable, and reasonable costs allowed under paragraph (a); and

(iv) the amount credited or debited to the consumer's account."

These steps can only be taken if the goods have been sold "in terms of" section 127. They cannot be competently taken if the goods were not sold "in terms of" section 127. The goods cannot be said to have been sold "in terms of" section 127 if there was no compliance with section 127(2).

[52] Section 127(7) and (8) reads:

"(7) If an amount is credited to the consumer's account and it is less than the settlement value immediately before the sale, or an amount is debited to the consumer's account, *the credit provider may demand payment from the consumer of the remaining settlement value, when issuing the notice required by subsection (5)(b)*.

(8) If a consumer—

(a) fails to pay an amount demanded in terms of subsection (7) within 10 business days after receiving a demand notice, *the credit provider may commence proceedings in terms of the Magistrates' Courts Act for judgment enforcing the credit agreement*; or

(b) pays the amount demanded after receiving a demand notice at any time before judgment is obtained under paragraph (a), the agreement is terminated upon remittance of that amount."

[53] If the goods were not sold "in terms of" section 127, the credit provider will not be entitled to demand payment from the consumer as provided for in section 127(7). Nor will it be entitled to institute court proceedings as provided for in subsection (8). In this regard special attention must be drawn to the provision of section 127(10). It provides that "[a] credit provider who acts in a manner contrary to this section is guilty of an offence".

[54] It seems to me that, where a court concludes, after the credit provider has sold the goods, that there was no compliance with section 127(2), this is fatal to the credit provider's action against the consumer. It is fatal because it means that the credit provider can no longer put right its failure to comply with section 127(2) since that compliance is required to precede the sale of the goods. It cannot be effected after the goods have been sold.

[55] At this stage it is appropriate to refer to a provision of the Act with which the applicant commenced his objection to the respondent's action. That is section 130(3) of the Act. It reads:

> "(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter *only if* the court is satisfied that—
>
> (a) in the case of proceedings to which section 127, 129 or 131 apply, the procedures required by those sections have been complied with."

[56] It is necessary to also quote section 130(4)(b). It reads:

> "(4) In any proceedings contemplated in this section, if the court determines that—
>
> (a) . . .
>
> (b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the

> court in circumstances contemplated in subsection (3)(c) the court must—
>
> (i) adjourn the matter before it; and
>
> (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed."

[57] Section 130(4) makes it clear that, if there has been no compliance with the procedures prescribed by section 127, the court may not proceed to determine the matter. It must postpone the matter and specify the steps that the credit provider must take before the matter may resume in court. That the court is enjoined not to proceed with the matter if there has been no compliance with the procedures prescribed by section 127 is an indication that the time when the court must satisfy itself whether there has been compliance with section 127 is as soon as possible after the institution of the proceedings. If the court fails to satisfy itself about that soon after the institution of the proceedings and seeks to do so much later, it would be risking unduly delaying the finalisation of the matter. If the court seeks to satisfy itself about that only at the trial and it concludes that there has been no compliance with section 127, a lot of money will have been wasted and there would have been a long delay in the finalisation of the matter.

[58] Section 130(3) means that the court may not determine a matter if it has not first satisfied itself that, in the case of proceedings to which sections 127, 129 or 131 apply, the procedures prescribed by sections 127, 129 or 131 have been complied with. The phrase "only if" in section 130(3) introduces a precondition that must exist before the court may have the competence or jurisdiction to determine the matter. Special note must be taken of the phrases "the court may determine the matter" and "only if the court is satisfied that . . ." in section 130(3). The part that reads "the court may determine the matter" is the first part of subsection (3). The phrase that starts with "only if" up to the end of that provision is the second part of subsection (3). The second part of subsection (3) denotes the jurisdictional requirement that must exist before the court may acquire the competence or jurisdiction to determine the matter.

[59] About jurisdictional facts or requirements, in *The New Constitutional and Administrative Law*, the authors say in part:

> "The legislative formula 'if x, then the administrator may do y' is very familiar in administrative law. The legislation empowering an administrator to act often prescribes *preconditions* that must exist prior to the exercise of the power and *procedures* to be followed (or formalities to be observed) when exercising the powers. Such preconditions and procedures are termed jurisdictional facts: 'substantive' jurisdictional facts in the case of preconditions, and 'procedural' jurisdictional facts in the case of procedural requirements. The point about jurisdictional facts is that the exercise of the power depends on their existence or observance, as the case may be. If the jurisdictional facts are not present or observed . . ., then the exercise of the power will as a general rule be unlawful."[49]

[60] In interpreting other statutory provisions in which "if" was or is used in the same way in which "only if" is used in section 130(3) our courts have held the event that comes after "if" as constituting a jurisdictional requirement. Section 46(9)(b)(i) and (ii) of the now repealed Labour Relations Act, 1956 (1956 Act) reads as follows in so far as it is relevant:

> "*If a dispute concerning an alleged unfair labour practice has been referred to—*
>
> *(i) an industrial council having jurisdiction in respect thereof . . . any party to the dispute may . . . refer the dispute to the industrial court for determination . . .*
>
> (ii) *a conciliation board and that board has failed to settle that dispute . . ., any party to the dispute may . . . refer the dispute to the industrial court for determination . . .*"

In relation to this provision, it was held that the referral of a dispute concerning an alleged unfair labour practice to an industrial council or a conciliation board was a jurisdictional requirement that needed to exist before such a dispute could be referred to the Industrial Court for determination. It was held that, if such a dispute had not

[49] Hoexter and Lyster *The New Constitutional and Administrative Law* (Juta & Co Ltd, Cape Town 2002) vol 2 at 138–9.

been referred to an industrial council or conciliation board, the Industrial Court would have no jurisdiction.

[61] In *Intervalve*[50] this Court acknowledged this. In relation to section 46(9)(b) it said:

> "Before the repeal of the 1956 Act by the LRA, it was widely accepted that the Industrial Court had no jurisdiction to determine an unfair labour practice dispute that had not first been referred to a conciliation process."[51]

This shows that the part of section 46(9)(b)(i) that reads:

> "If a dispute concerning an alleged unfair labour practice has been referred to . . .
> (i) an industrial council . . .; or
> (ii) a conciliation board. . ."

was accepted as constituting a jurisdictional requirement that had to exist before the second part could happen. The second part was the one relating to the referral of the dispute to the Industrial Court for determination. As I have said, the part of section 130(3) of the Act that comes immediately after the words "only if" constitutes a jurisdictional requirement that must exist before the court may determine the matter.

[62] Section 191(5)(a) and (b) of the Labour Relations Act[52] (LRA) reads as follows insofar as it is relevant—

> "*If a council or a commissioner has certified that the dispute remains unresolved*, or, if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved—
> the council or the Commission must arbitrate the dispute at the request of the employee . . .

[50] *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others* [2014] ZACC 35; 2015 (2) BCLR 182 (CC); 2015 BLLR 205 (CC) (*Intervalve*).

[51] Id at para 127.

[52] 66 of 1995.

. . .

. . .

. . .

the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that . . .

. . .

. . .

. . ."

[63] In respect of the provisions of section 191(5) of the LRA this Court reached the same conclusion in *Intervalve* as it did in respect of section 46(9)(b) of the 1956 Act. In *Intervalve* this Court held as follows in regard to section 191(5):

> "Section 191(5) creates two conditions one of which must be met before a dismissal dispute may be arbitrated or may be referred to the Labour Court for adjudication. The first condition is that the CCMA or bargaining council, as the case may be, must have issued a certificate of non-resolution of the dispute. The second is that a period of 30 days from the date on which the CCMA or bargaining council received the referral must have lapsed."[53]

[64] A little later in the same judgment this Court said:

> "It seems to me that, whatever terminology one may use to describe the effect of section 191(5)(b), it lays down two preconditions one of which must be met before a dispute concerning the dismissal of employees for striking may be referred to the Labour Court for adjudication. If neither of the preconditions has been met, the Labour Court has no jurisdiction to adjudicate the dispute. The event of the expiry of 30 days applies if the dispute had been referred to the council or CCMA for conciliation under section 191(1)."[54]

[65] Section 130(3) does not just use the word "if" but uses the words "only if" which emphasise that the event referred to before the words "only if", which is the

[53] See *Intervalve* above n 50 at para 112.

[54] Id at para 115.

determination of the matter, is precluded unless the event referred to after the words "only if" has occurred. It will be noticed that section 191(5)(a) has two parts. The first part of the provision begins with "if" and ends with the word "unresolved". The second part starts with "the council". The first part denotes the jurisdictional requirement that must exist before the council may exercise its jurisdiction and arbitrate the dispute. The same applies to section 191(5)(b). In the latter provision, the first part is the same as the first part in section 191(5)(a). The second part in section 191(5) is the one that starts with "the employee".

[66] Section 191(5) provides that the CCMA or bargaining council must arbitrate the dispute at the request of the employee, if a council or the commissioner has certified that the dispute remains unresolved or if 30 days have expired since the council or CCMA received the referral and the dispute remains unresolved. In regard to this provision, this Court, inter alia, said in *Intervalve*: "An employee may only competently make that request when one of the events has occurred."[55]

[67] About the two preconditions in sections 191(5) this Court said:

> "That these two events are preconditions is made clear by the use of 'if' at the beginning of the first event mentioned in section 191(5) and the repetition of that "if" just before the second event in the provision."[56]

[68] This Court made it clear that section 191(5) concerns jurisdiction. Given the use of "if" and "may" in section 191(5), and "may" and "only if" in section 130(3) of the Act, it seems to me that section 130(3) relates to the competence or jurisdiction of the court. Its effect is that, the court will have no jurisdiction in respect of a matter where the procedures prescribed by section 127(2) have not been complied with. Therefore, compliance with the procedure in section 127(2) goes to the competence or jurisdiction of the court. A decision that there has been compliance with section

[55] Id at para 114.

[56] Id at para 113.

127(2) is a decision on the competence or jurisdiction of the court. Once a court of first instance has made a decision on jurisdiction, it cannot alter that decision later.

[69] In *Zweni*[57] the Supreme Court of Appeal held that to be appealable a decision must be final in effect and not open to alternation by the court of first instance, be definitive of the rights of the parties and have the effect of disposing of at least a substantial part of the relief claimed in the main proceedings. The Court said that in determining the nature and effect of a judicial pronouncement, not merely the form of the order must be considered but also, and, predominantly, its effect.

[70] However, in *Makhothi*[58] the Appellate Division held:

> "We . . . are satisfied that, although interlocutory in form, the order of the Court a quo dismissing the exception to the special plea (which claimed that the plaintiff's action was barred because the notice required by s 32(1) of the Police Act 7 of 1958 had not been timeously given) was final and definitive in effect and therefore appealable. . . This was not a case in which further evidence could have led to a different conclusion at the final stage of the action; the pleadings contained all the facts relevant to the issue. By dismissing the exception to the special plea the Court a quo therefore 'spoke the final word in the suit' and its order is not 'repairable at the final stage'. (see *Blaauwbosch Diamonds Ltd v Union Government* 1915 AD 599 at 601-2.)"

[71] In *Maize Board*[59] the Supreme Court of Appeal also had to decide on the appealability of an exception. In the course of a review of the authorities it referred to *Du Toit.*[60] About that case, the Supreme Court of Appeal said—

> ". . . this Court held that the dismissal of an exception on the ground that the Court does not have jurisdiction to hear the matter constituted a final judgment and as such an exception to the general principle that the dismissal of an exception is not final."[61]

---

[57] *Zweni* above n 2 at 532I –533A.

[58] *Makhothi v Minister of Police* 1987 (1) SA 69 (A) at 72H.

[59] *Maize Board v Tiger Oats & Others* [2002] ZASCA 74; 2002 (5) SA 347 (SCA).

[60] *Du Toit v Ackerman* 1962 (2) SA 581 (A) at 587D-E.

The Supreme Court of Appeal held that, in the light of that Court's interpretation of section 20 of the now repealed Supreme Court Act and certain decisions—

> "it now has to be accepted that a dismissal of an exception (save an exception to the jurisdiction of the Court) presented and argued as nothing other than an exception does not finally dispose of the issue raised by the exception and is not appealable."[62]

From this it is clear that the dismissal of an exception to the jurisdiction of a court is regarded as final and appealable.

Was there compliance with section 127(2)?

[72] Once it is accepted that the decision appealed against is appealable, the next question is whether the respondent complied with section 127(2) when it sent the section 127(2) notice by ordinary mail. I agree with the first judgment's conclusion that there is merit in the applicant's contention that the manner in which section 127(2) must be complied with need not be different from the manner in which section 129 must be complied with. I do so for the reasons given in the first judgment and in this judgment.

[73] In *Sebola*[63] this Court held that the sending of a section 129 notice by ordinary mail did not constitute compliance with section 129. This Court said—

> "given the high significance of the section 129 notice it seems to me that the credit provider must make averments that will satisfy the court . . . that the notice, on balance of probabilities, reached the consumer."[64]

This Court went on to say—

---

[61] *Maize Board* above n 59 at para 9.

[62] Id at para 14.

[63] *Sebola* above n 11.

[64] Id at para 74.

> "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."[65]

Later, the Court said:

> "To require mere despatch of the section 129 notice, as the Bank and BASA sought, under-appreciates its importance in the statutory scheme."[66]

[74] In *Kubyana*[67] this Court did not say anything that detracted from this holding. Instead, its aid in part—

> "(b) when a consumer has elected to receive notifications through the postal service, the credit provider must show that–
>
> (i) the section 129 notice was sent by registered mail and delivered to the correct branch of the Post Office. . ."[68]

The Court laid down three other requirements.

[75] In my view, it would follow that the sending of a section 127(2) notice by ordinary mail also does not constitute compliance with section 127(2). It was accepted that to inform the Court simply that a section 129 notice had been sent by ordinary mail would not be enough to satisfy the court that section 129 had been complied with. In respect of a section 127(2) notice as well, it would not be enough for the credit provider to simply inform the court that the section 127(2) notice was sent or was sent by ordinary mail.

---

[65] Id at para 75.

[66] Id at para 85.

[67] *Kubyana* above n 15.

[68] Id at para 43.

[76] If one has regard only to the respondent's particulars of claim, the High Court could not conclude that there had been compliance with section 127(2). This is because all that was alleged in the particulars of claim with regard to compliance with section 127(2) was that the section 127(2) notice was sent to the applicant. There was no indication as to how that notice was sent. That was not sufficient to enable the Court to reach such a conclusion.

[77] If it is accepted that the determination of whether the procedures in section 127 have been complied with must be made by the Court soon after the institution of the action, the respondent was obliged to place before the High Court sufficient facts to enable the Court to satisfy itself that there had been compliance with section 127. It failed to do so. On the other hand, if the High Court was entitled to have regard to the applicant's "exception" and affidavit, the only conclusion it could reach was that there had been no compliance with section 127(2). This is so because the applicant attached to his affidavit a letter from the respondent's attorneys in which they admitted that the section 127(2) notice was sent by ordinary mail and contended that sending a section 127(2) notice by ordinary mail constituted compliance with section 127(2).

[78] Pursuant to section 130(3), the High Court was not only entitled but was obliged to have regard to the facts placed before it by way of the applicant's affidavit. The respondent did not object to the delivery of the affidavit. It had the opportunity to deliver its own affidavit to dispute the contents of the applicant's affidavit but elected not to do so despite the fact that section 130(3) required the court to satisfy itself on whether the section 127 procedure had been complied with. It, therefore, could not complain if the Court took the affidavit into account in seeking to satisfy itself whether section 127(2) had been complied with.

[79] The High Court erred in holding that there had been compliance with section 127(2). It should have held that there was no compliance and upheld the applicant's objection. A section 127(2) notice must be sent to the consumer before the goods can be sold. Since the motor vehicle has been sold already, the respondent cannot comply

with section 127 anymore even if it was given an opportunity to do so. Therefore, the Court cannot competently order the respondent to take any steps to comply with section 127. Section 130(4)(b) has no application. The result is that the only order that the High Court could competently make if it had concluded that there had been no compliance with section 127(2) would have been to uphold the objection and dismiss the respondent's action.

[80] In the circumstances I would make the following order:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld and the order of the High Court is set aside and replaced with the following order:
   "(a) It is declared that the plaintiff has not complied with section 127(2) of the National Credit Act 34, 2005.
   (b) The plaintiff's action is dismissed with costs."
4. There is no order as to costs in this Court.

For the Applicant:	In Person instructed by M Baliso & Associates
For the Respondent:	No appearance