THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 640/2009

In the matter between:

BENJAMIN ROSSOUW	**First Appellant**
SANDRA WILSON-ROSSOUW	**Second Appellant**

and

FIRST RAND BANK LIMITED t/a FNB HOMELOANS (formerly FIRST RAND BANK OF SOUTH AFRICA LTD)	**Respondent**

Neutral citation: *Rossouw v First Rand Bank Ltd*(640/09) [2010] ZASCA 130 (30 September 2010)

Coram: MPATI P, NAVSA, CLOETE, MAYA JJA et EBRAHIM AJA

Heard: 07 September2010

Delivered: 30 September 2010

Summary: National Credit Act 34 of 2005 – summary judgment application – whether s 130(2) of the Act limits a credit provider's claim under a mortgage agreement to the proceeds realised upon execution of the mortgaged property – whether credit provider complied with the provisions of 129(1) read with s 130(1) of the Act.

ORDER

On appeal from: North Gauteng High Court, (Pretoria) (Ellis AJ sitting as court of first instance).

1. The appeal is upheld with costs that include the costs of two counsel.

The order of the court below is set aside and the following is substituted:
'The application for summary judgment is dismissed with costs.'

JUDGMENT

MAYA JA (concurring Mpati P, Navsa, Cloete JJA and Ebrahim AJA)

[1] This is an appeal, with the leave of the court below, against summary judgment granted by the Pretoria High Court (Ellis AJ) against the appellants in favour of the respondent (the bank) based on a loan agreement and mortgage bond.

[2] The facts gleaned from the summons and summary judgment affidavits are the following. On 8 June 2006 the appellants, who are married to each other, concluded a loan agreement with the bank. The latter is a registered credit provider[1] in terms of s 40 of the National Credit Act 34 of 2005 (the Act). In terms of this agreement the bank granted the appellants a loan in the sum of R1 030 000 repayable in monthly instalments of R9 003,88 which was secured by a mortgage bond of R1 800 000 over the appellants' immovable property (the mortgaged property).

1 Section 1 of the Act defines a credit provider, as follows: '"credit provider", in respect of a credit agreement to which this Act applies, means –

…

c) the party who extends credit under a credit facility;

…

d) the mortgagee under a mortgage agreement;

…

the party who advances money or credit to another under any other credit agreement'.

[3] Some of the material terms of the mortgage bond were:

'16.1.1 If the mortgagor[s] fail to pay any amount due in terms of this bond … on due date … then, at the option of the bank, all amounts whatsoever owing to the bank by the mortgagor[s] shall forthwith be payable in full … and the bank may institute proceedings for the recovery thereof and for an order declaring the mortgaged property executable …;
17. A certificate purporting to be signed on behalf of the bank shall be proof until the contrary is proved of the balance owing and the fact that it is due and payable … and shall be valid as a liquid document for the purposes of obtaining … summary judgment;

…
20. For the purposes of this bond and of any proceedings which may be instituted by virtue hereof, and of the service of any notice, *domicilium citandi et executandi* is hereby chosen by the mortgagor[s] at the mortgaged property;

21.1 Any notice given by the bank in terms of this bond may at the bank's option be addressed to the mortgagor[s] at the [chosen] *domicilium* … and may be served by registered post;
21.2 Notices so posted shall be deemed to be received by the mortgagor three days after posting;
21.3 A certificate signed on behalf of the bank, stating that a notice has been given, shall be sufficient and satisfactory proof thereof, and the authority of the signatory and validity of the signature need not be proved.'

[4] About two years later, the appellants fell into arrears in respect of their monthly repayments. In September 2008 the bank sent them a notice in terms of s 129(1)(a) of the Act informing them of their default. As a result, the appellants attended debt counselling and subsequently made a debt restructuring proposal to the bank. On 7 October 2008 the bank countered the appellants' offer with its own revised payment plan to which the appellants agreed but inexplicably abandoned to pursue debt management. No payment appears to have been made by the appellants until 23 March 2009. The amount then paid was only a sum of R20 450. It is not clear how this amount was computed but it appears to be inadequate in terms of the requirements of both the agreement and the revised payment plan having regard to the considerable period during which no payment was made.

[5] On 23 April 2009 the bank allegedly delivered a fresh notice in terms of s 129(1)(a) (the notice). On 22 May 2009 it issued a summons to which was attached a certificate of compliance dated 15 May 2009 stating that the bank had issued and delivered the requisite notice. The summons claimed payment of the sum of R1 117 180,65 from the appellants and ancillary relief, including an order declaring the mortgaged property executable. The basis of the claim was that the appellants had failed to maintain regular

instalments and that the full outstanding amount had thus become due and payable in terms of the agreement.

[6] The appellants entered an appearance to defend the action, prompting the bank to apply for summary judgment in terms of uniform rule 32. The appellants opposed the application on the bases that:

(a) the summons was excipiable because s 130(2) of the Act precludes a credit provider from claiming a shortfall on a mortgage loan agreement as it is not among the types of agreements specified in the section and that the only order the court below could have granted was merely to declare the property executable;

(b) they had not received the notice as envisaged in sections 129(1) and 130(1); and

(c) the arrear amount claimed is incorrect as it ignores payment of sums amounting to R101 950 which reduced the arrears to R12 850 and the outstanding balance to R1 005 052.

[7] None of these defences found favour with the court below. As regards (a), the court found that whilst it is so that s 130(2) applies only to the pledge and cession of movables and has no application to mortgage agreements, the bank's claim fell within the ambit of s 130(1) of the Act which is not limited by s 130(2) in so far as mortgage agreements are concerned.

[8] In rejecting the appellants' second defence that they did not receive the notice, the court adopted the approach set out in *Munien v BMW Financial Services (SA) (Pty) Ltd*.[2] On that basis the court held that in view of the legislature's omission to define 'deliver' in the Act, delivery of the notice occurred when it was sent by registered post to an address chosen by the appellants in the agreement irrespective of whether it was actually

2 2010 (1) SA 549 (KZD).

received. This had to be so, the court reasoned, as this method is one of four possible methods of delivery prescribed (as contemplated in s 65(1)) by the Minister in the definition of 'delivered' set out in s 1 of the National Credit Regulations (the regulations).[3] The court also relied on the parties' agreement to a method of communicating set out in clauses 21.1 to 21.3 of their agreement, which provided for delivery of notices at the mortgagor's *domicilium* by registered post.

[9] The court below found no substance in the defence that the appellants had paid a substantial sum towards liquidating the arrears and held that their affidavit failed to show that they purged their default thus entitling the bank to enforce its claim in full. Summary judgment was then granted against the appellants jointly and severally, the one paying the other to be absolved, as prayed.

[10] The issues on appeal remain as they were in the court below, namely whether; (a) the court below could have granted summary judgment when a mortgage bond is not included in the instances referred to in s 130(2) of the Act, which entitles specified types of credit providers to approach a court for the enforcement of the consumer's remaining obligations; (b) the bank complied with s 129(1) read with s 130(1) of the Act by giving notice to the appellants; and (c) the appellants set out sufficient facts in the opposing affidavit to have constituted a defence against the application for summary judgment.

[11] Another issue which arose, with which I deal directly as it courted no controversy, is an application to lead further evidence in the appeal proceedings launched by the bank on the eve of the hearing. Its basis was that the submission made in the appellants' heads of argument in the appeal, that the bank did not establish the method by which the notice was delivered, was not raised in the court below. It was contended on the bank's behalf that the appellants' defence at the summary judgment hearing was merely that the appellants did not receive the notice and that it was not disputed that the

3 Published in Government Notice R489 of 31 May 2006.

notice had been sent to them by registered mail as proof thereof was handed in without demur from their counsel.

[12] The evidence sought to be admitted, which it was contended supported the bank's stance in this regard, was a transcript of the argument at that hearing during which the so-called proof was submitted to the court. The appellants did not oppose the application and the transcript was accordingly received in evidence.

[13] I turn to deal with the main issues.

WHAT MEANING TO ASCRIBE TO S 130(2) VIS-À-VIS MORTGAGE AGREEMENTS?

[14] As mentioned above, the appellants took a point *in limine* that s 130(2) limits a credit provider's claim under a mortgage agreement to the proceeds of the sale of the mortgaged property and that the bank is precluded from claiming any shortfall if the full amount of the debt under the agreement is not realised after execution of such property. This contention was based on an application of the *expressio unius est exclusio alterius* principle in interpreting the section.

[15] Section 130 provides:

'**130 Debt procedures in a Court**

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

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

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

(i) not responded to that notice; or

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

…

(2) In addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at

any time if–

(a) all relevant property has been sold pursuant to–

(i) an attachment order;
(ii) surrender of property in terms of section 127; and

b) the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.'

[16] The types of agreements referred to in subsection (2), namely an instalment sale agreement, a secured loan and a lease are defined in s 1 of the Act.[4] They all involve a sale, pledge or cession of movable property. A mortgage agreement, on the other hand, is specifically defined as a 'credit agreement that is secured by a pledge of immovable property'. Quite clearly, as the court below found, s 130(2) has no application to mortgage agreements. The bank did not contend otherwise. The parties' point of departure relates only to the significance of the Legislature's exclusion of mortgage agreements from the classes of contract listed in these provisions.

4 The agreements are defined as follows:
' "instalment agreement" means a sale of movable property in terms of which–
a) all or part of the price is deferred and is to be paid by periodic payments;
possession and use of the property is transferred to the consumer;
ownership of the property either–
(i) passes to the consumer only when the agreement is fully complied with; or
(ii) passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and
b) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred;
"**lease"** means an agreement in terms of which–
a) temporary possession of any movable property is delivered to or at the direction of the consumer, or the right to use any such property is granted to or at the direction of the consumer;
payment for the possession or use of that property is–
(i) made on an agreed or determined periodic basis during the life of the agreement; or
(ii) deferred in whole or in part for any period during the life of the agreement;
b) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred; and
at the end of the term of the agreement, ownership of that property either–
(i) passes to the consumer absolutely; or
(ii) passes to the consumer upon satisfaction of specific conditions set out in the agreement;
"secured loan" means an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person–
a) advances money or grants credit to another; and
retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due under that agreement;'

[17] As can be imagined and was properly acknowledged by counsel on behalf of the appellants, any number of inequities may result for credit providers from the interpretation for which the appellants contend. It needs to be considered that whilst the main object of the Act is to protect consumers,[5] the interests of creditors must also be safeguarded and should not be overlooked.[6] This is evidenced by s 3(d) which provides that equity in the credit market and industry – which the Act significantly acknowledges must be competitive, efficient and sustainable – entails, inter alia, balancing the respective rights and responsibilities of credit providers and consumers.

[18] It is settled that a statute must explicitly state an intention to alter the common law or the inference from the statute must be such that it can only

5 The purpose of the Act is set out in s 3 which reads:

'The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by–

a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have been unable to access credit under sustainable market conditions;

ensuring consistent treatment of different credit products and different credit providers;

a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;

ensuring consistent treatment of different credit products and different credit providers;

b) promoting responsibility in the credit market by–

(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and

discouraging reckless credit granting by credit providers and contractual default by consumers;

c) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

addressing and correcting imbalances in negotiating power between consumers and credit providers by–

(i) providing consumers with education about credit and consumer rights;

providing consumers with adequate disclosure of standardised information in order to make informed choices; and

providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;

d) improving consumer credit information and reporting and regulation of credit bureaux;

addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.'

6 See *Jaftha v Schoeman & others; Van Rooyen v Stoltz & others* 2005 (2) SA 140 (CC) paras 42 and 51.

be concluded that that was the legislature's intention.[7] There are instances in the Act where the legislature makes specific provision in the event that a party's rights under a credit agreement are tampered with. For example, in s 83 provision is made for the suspension of an agreement that has been found 'reckless'. In as many words, in s 83(2) the legislature grants a court a discretion to set aside all or part of a consumer's rights and obligations under an agreement as it deems just and reasonable in the circumstances. Section 83(3) makes provision for an agreement to be suspended where a consumer has been found over-indebted.

[19] These provisions make it abundantly clear that the legislature recognised the need to express its intention where it sought to interfere with vested rights. Interestingly, s 90(2)(c) acknowledges the parties' common law rights and declares unlawful any provisions in a credit agreement which purport to waive such rights, as may be applicable to the agreement. I find it inconceivable, therefore, that the legislature would, in the same Act, indirectly do away with vested rights such as the mortgagee's right to claim the balance of the debt after execution against the mortgaged property. For these reasons, I am unable to make the inference advanced by the appellants.

[20] As was contended on the bank's behalf, it seeks to enforce the entire agreement, which includes a *lex commissoria,* arising from the appellants' default. In my view, the plainly-worded, self-contained provisions of s 130(1) allow the bank to do exactly that. Section 130(2) bears no relevance and that, I think, is the end of the matter.

WERE THE APPELLANTS GIVEN NOTICE AS ENVISAGED IN SECTIONS 129(1) AND 130(1)?

7 *Casserley v Stubbs* 1916 TPD 310 at 312.

[21] At the heart of this issue is the precise method of delivery of the notice contemplated in s 129(1)(a) and whether it is necessary that it is actually received by the consumer. The relevant parts of s 129 read:

> '**129 Required procedures before debt enforcement**
>
> (1) If the consumer is in default under a credit agreement, the credit provider–
>
> a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before–
>
> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and
>
> (ii) meeting any further requirements set out in section 130.'

[22] Evidently, a credit provider may not commence legal proceedings to enforce its claim without complying with the injunction contained in s 129(1)(a). But the section does not state the manner in which a credit provider is to furnish a defaulting consumer with the written notification it demands. Section 130(1)[8] is worded differently as it does not use the words 'draw … to the notice'. It entitles a credit provider to approach the court for an order to enforce a breached credit agreement where, inter alia, at least ten business days have elapsed since the credit provider 'delivered a notice' to the consumer as contemplated in s 129(1) and the consumer has not responded thereto. But then, the term 'delivered' is not defined in the Act.

[23] Recourse must therefore be had, first, to s 65 of the Act which deals with the consumer's right to receive 'documents' which I understand to include notices. The material provisions of the section read:

'(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.

8 The section is quoted in full at para 15 of this judgment.

(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 the following mechanisms–

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

by fax;

by e-mail; or

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).'

[24] The Act has defined the term 'prescribed' used in subsection (1) as meaning 'prescribed by regulation'. The regulations do contain a definition of the term 'delivered'. However, bearing in mind that it is generally impermissible to use regulations created by a minister as an aid to interpret the intention of the legislature in an Act of parliament, notwithstanding that the Act may include the regulations,[9] the question remains whether this definition is the 'prescribed manner' envisaged by s 65(2).

[25] Chapter I of the regulations deals with the 'Interpretation and Application of [the] Act' and s 1 thereof reads:

'In these Regulations, any word or expression defined in the Act bears the same meaning as in the Act and–

…

"delivered" 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, the recipient's registered address'.

9 *Clinch v Lieb* 1939 TPD 118 AT 125; *Hamilton-Brown v Chief Registrar of Deeds* 1968 (4) SA 735 (T) at 737 C-D; *Moodley & others v Minister of Education and Culture, House of Delegates, & another* 1989 (3) SA 221 (A) at 233E-F; *National Lotteries Board v Bruss NO* 2009 (4) SA 362 (SCA).

[26] The use of the expression '[i]n these regulations', which to my mind strongly suggests that the definitions in regulation 1 are operative only for purposes of the regulations, poses a difficulty for me. This is especially so as the regulation makes no mention of s 65(1) or the word 'prescribed' used in that subsection. It may be so that such a cross-reference may not be necessary where it is not required by the empowering statute,[10] but that apart, there, clearly, is need for the definition in the regulations themselves as the terms 'delivered', 'deliver' or 'delivery are interspersed throughout their body.

[26] For example, (a) regulation 4(3) requires a person seeking to register in terms of s 45 to provide information requested by the National Credit Regulator within a certain period after the request is delivered to him; (b) in terms of regulation 34 a consumer is obliged to inform the credit provider of any changes to the location of the relevant goods by delivering a written notice; (c) regulation 38 requires delivery of a notice to a consumer of a charge or charges made against an account and (d) regulation 46 makes provision for charges relating to delivery of a letter of demand.[11] For these reasons, contrary to the views of the court below, I do not think that any regard should be had to the definition of the word 'delivered' in the regulations in interpreting sections 129(1)(a) and 130(1). As I see it, the definition does not purport to contain a 'prescribed manner' for delivery and the answer must lie in the provisions of the Act itself.

10 *Administrateur, Transvaal v Quid Pro Quo Eiendommaatskappy (Edms) Bpk* 1977 (4) SA 829 (A); *Howick District Land Owners Association v Umngeni Municipality* 2007 (1) SA 206 (SCA) paras 19 and 20; *Shaik v Standard Bank of SA Ltd* 2008 (2) SA 622 (SCA) para 17.

11 See, also, regulation 6 which requires delivery of a notice for purposes of s 48(3); regulation 24(2) and (5) dealing with a notice to be delivered by debt counsellor to creditors and regulation 37 which prescribes delivery of a notice terminating an agreement to the credit provider. These particular regulations, however, specify the manner in which the contemplated delivery is to be effected but consonant with the definition.

[27] This finding requires an examination of s 65(2). The section sets out six methods by which a document may be delivered. Thus, the document may be made available to a consumer, 'in person', at the credit provider's premises or at any other location he chooses. In the latter instance, he bears the expenses of the exercise. The document may also be delivered by ordinary mail, fax, email or printable web-page. Notably, the manner of such delivery is chosen from these options by the consumer.

[28] It appears to me that s 96 which deals with the address for delivery of legal notices – and a s 129(1)(a) notice by its very nature must fall in this category – is relevant for present purposes and must be read with s 65(2). It provides:

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

(a) the address of that party as set out in the agreement, unless paragraph (b) applies; or
(b) the address most recently provided by the recipient in accordance with subsection (2).
(2) A party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered mail, or electronic mail, if that other party has provided an email address.'

[29] As previously stated, the parties agreed in clause 21 of their agreement to a *domicilium* and mode of delivery of notices as envisaged by sections (65)(2) and 96. From the available options, which include personal delivery at their expense, the appellants chose delivery by post. In my view, that the method chosen was registered mail, which is not one of the options provided in s 65(2), does not offend the provisions of the section. The legislature has sanctioned postal delivery. Registered mail is, in any event, a more reliable means of postage and cannot harm either party's interests.

[30] I am reinforced in this view by the catch-all provisions of s 168 of the Act dealing with service of documents, which in the legal context is synonymous to 'delivery of documents'. This section deems sending a

document by registered mail to a person's last known address proper service, unless otherwise provided for in the Act. These provisions, I think, put it beyond doubt that the legislature was satisfied that sending a document by registered mail is proper delivery. And 'send' according to *The Shorter Oxford English Dictionary* means 'to despatch (a message, letter, telegram etc) by messenger, post etc.'. It does not include 'receipt' of the sent item.

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

[32] Does this finding conflict with the purposes of the Act which requires such purposes to be given effect to in the interpretation of its provisions? I think not. I understand the legislature to have basically meant to protect the consumer from exploitation by credit providers by, inter alia, preventing predatory lending practices; to ameliorate the financial harm which a consumer may suffer where unable to meet his obligations under a credit agreement and generally to achieve equity in the lending market by levelling the playing field between parties who do not have equal bargaining power. I do not see how the above interpretation of the relevant provisions of the Act detracts from this object.

[33] Having established what section 129(1) required of the bank, it

remains to determine whether or not the latter complied with the relevant provisions. No allegation was made either in the summons or the summary judgment affidavit regarding the method employed in delivering the notice. The bank merely stated cryptically in its summons that '[t]he plaintiff has … complied with section 129(1) and 130 of the said Act. Copies of the notices in terms of the aforementioned sections are annexed hereto as "A" and "B" respectively.' Annexures A and B were documents titled 'NOTICE IN TERMS OF SECTION 129(1) OF THE NATIONAL CREDIT ACT' and 'CERTIFICATE OF COMPLIANCE IN TERMS OF SECTION 129(1) OF THE NATIONAL CREDIT ACT', respectively.

[34] It is only in Annexure B, signed by one of the bank's managers, that further mention of the notice was made. There, it was alleged that '[a] notice in terms of s 129(1) of the Act was issued to the [appellants] on 23 April 2009. At least ten business days have lapsed since the bank delivered the notice.' These allegations are obviously inadequate for purposes of establishing whether the notice was delivered in terms of the relevant provisions. And, no doubt, realising this material shortcoming in its papers, the bank sought to rely on the document handed in during the summary judgment hearing, which is referred to in the transcript of those proceedings, as proof that the notice had been delivered by registered mail.

[35] However, there is an insurmountable hurdle. Uniform rule 32(4) limits a plaintiff's evidence in summary judgment proceedings to the affidavit supporting the notice of application. The document was not annexed to the summons. Thus, it matters not that it was handed in without complaint. It was simply inadmissible.

[36] Even if this were not so, the document could not have assisted the bank's case. On its face, it lists the names and address of the appellants among the addressees to which registered letters are to be sent. But, it further requires confirmation of the number of letters to be posted, the signature of the client sending the letter or letters, the signature of the 'accepting officer', presumably the post office official processing the transaction, and the date of the transaction. None of these entries were made. These omissions, which the bank did not explain, materially affect the document's reliability. As it stands, it does not confirm that a registered letter was actually sent to the appellants. Even if it did, without the date it is not possible to link it to the sending of the relevant notice particularly in view of the fact that an earlier one was previously sent in 2008.

[37] In the circumstances, the bank did not prove that it delivered the notice. As pointed out earlier, sections 129(1)(b)(i) and 130(1)(b) make this a

peremptory prerequisite for commencing legal proceedings under a credit agreement and a critical cog of a plaintiff's cause of action. Failure to comply must, of necessity, preclude a plaintiff from enforcing its claim; this despite the fact that in this matter it was not disputed that the appellants were in arrears and thus breached their contractual obligations. The bank, therefore, failed to make out a case for summary judgment and it ought to have been refused. It is unnecessary to consider the third issue in the light of this finding.

[38] In the result the following order is made:

1. The appeal is upheld with costs that include the costs of two counsel.
2. The order of the court below is set aside and the following is substituted:

'The application for summary judgment is dismissed with costs.'

_____

MML MAYA

JUDGE OF APPEAL

CLOETE JA (MPATI P, NAVSA and MAYA JJA and EBRAHIM AJA concurring):

[39] I have had the benefit of reading the judgment of my colleague Maya JA. I agree with the order she proposes, and also her reasoning. I wish however to add further reasons in justification of her conclusion that s 130(2) of the Act does not have the meaning accorded to it by the appellants. I also wish to deal in greater detail with the contents of the summary judgment application, the proceedings in the court below and the handing up of documents to a court seized with such an application. Finally, I wish to deal with standard form documents and the effect of the stated purpose of the Act in cases such as the present.

[40] I shall deal first with the s 130(2) argument advanced by the appellants. The argument was that s 130(2) limits the claim by a credit provider who is a mortgagee to the proceeds of the sale of the mortgage property, so that the credit provider is precluded from claiming any shortfall if the full amount of the debt is not realised after execution against the property mortgaged.

[41] The argument is without substance. What the section means is that in the three types of credit agreement mentioned (ie an instalment agreement, a secured loan and a lease), if the further requirements of the section are satisfied (ie all relevant property has been sold, pursuant to an attachment order or the surrender of property in terms of s 127; and the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement), then the credit provider is excused from complying with subsec (1) (ie the credit provider does not have to send a notice and wait for the days to elapse). The circumstances under which a credit provider in the three types of contract mentioned in subsec (2) may approach a court for the enforcement of a credit agreement, are in addition to the circumstances set out in subsec (1) ─ that is why subsec (2) commences with the very words 'in addition to the circumstances contemplated in subsec (1)'.

[42] The omission of a credit provider who is a mortgagee in subsec (2) means that such a credit provider can only proceed under subsec (1). The rationale is clear: the consumer's property is at stake, and that will usually mean (for those fortunate enough to own property) his or her home and that of the family as well. The omission of a credit provider who is a mortgagee in subsec (2) cannot mean that to the extent that the debt is not satisfied by execution against the mortgaged property, that part of the debt is unenforceable. That would constitute a serious inroad upon the rights of the mortgagee which would probably be constitutionally unjustified and which certainly cannot be reconciled with the provisions of s 83(2)(a) which forms part of Part D: Over-indebtedness and reckless credit. Section 83 provides:

'(1) Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, the court may declare that the credit agreement is reckless, as determined in accordance with this Part.

(2) If a court declares that a credit agreement is reckless in terms of s 80(1)(a) or 80(1)(b)(i), the court may make an order ─

(a) setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and equitable in the circumstances . . .'.

It cannot have been the intention of the legislature to provide in Part D of the Act for a mechanism for determining whether credit was recklessly granted and vest a discretion in a court to set aside all or part of a consumer's obligations, and then at the same time provide that to the extent that execution against property mortgaged does not cover the mortgage debt, there would be automatic forfeiture of the balance even where the incurring

of credit under the bond was not reckless.

[43] I therefore agree with my learned colleague, both for the reasons she has given and for the reasons set out above, that s 130(2) of the Act does not have the effect for which the appellants contend.

[44] As my learned colleague has said, there was an application to admit evidence on appeal. I now propose dealing with that evidence. It comprised a transcript of the argument in the court a quo and a document handed up by the Bank's junior counsel during those proceedings. In the absence of opposition, the evidence was admitted. In retrospect, I consider that it would have been more appropriate to admit the evidence provisionally. Had that been done, the court would have been in a position to refuse to admit it, which I consider would have been the correct conclusion for the reasons which follow.

[45] To the extent that the transcript was relied upon by the Bank as demonstrating that in the court a quo the appellants' junior counsel did not dispute that the notice in terms of s 130(1) read with s 129(1) of the Act was sent by registered post, it is irrelevant. Whatever happened in the court below, it remained open to the appellants to raise this point on appeal.

[46] To the extent that the transcript was relied upon by the Bank as demonstrating that its junior counsel handed up to the court the document, entitled 'List of Registered Letters', without objection by the appellants' junior counsel, both it and the list are inadmissible. The list was handed in to the court a quo to prove that annexure A to the particulars of claim, the notice in terms of ss 130(1) and 129(1), had been sent by registered post. That was not permissible, whether the appellants' counsel objected or not; the provisions of uniform rule of court 32 are clear and peremptory:

'(2) The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay. If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 10 days from the date of the delivery thereof.

(4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in sub-rule (2), nor may either party cross-examine any person who gives

evidence *viva voce* or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.' (Emphasis supplied.)

The fact that the list does not prove the fact it was submitted to the court a quo to prove is irrelevant. It was not permissible for the Bank's junior counsel to hand it up, it was correctly disregarded by the court a quo and it falls to be ignored on appeal.

[47] The certificate of balance, also handed up to the court a quo, stands, however, on a different footing. The court a quo refused to have regard to the certificate. That approach was not correct. The certificate did not, as the court a quo considered, amount to new evidence which would be inadmissible under rule 32(4). To the extent that the certificate reflects the balance due as at the date of hearing, it is merely an arithmetical calculation based on the facts already before the court which the court would otherwise have to perform itself. Such calculations are better performed by a qualified person in the employ of a financial institution. And to the extent that such a certificate may reflect additional payments by the defendant after the issue of summons, or payments not taken into account when summons was issued, this constitutes an admission against interest by the Bank and the Bank is entitled to abandon part of the relief it seeks. Certificates of balance handed in at the hearing (whether a quo or on appeal) perform a useful function and are not hit by the provisions of rule 32(4).

[48] Before turning to the facts of the appeal, it may be useful for me to point out that there are remedies available to defendants in the position of the present appellants who have not received notices allegedly delivered to them. They are entitled to invoke the provisions of rule 35(11) and, where applicable, rule 35(12), to obtain production of documents evidencing the credit provider's compliance with s 65(2), eg a slip reflecting proof of posting by registered post or a telefax transmission sheet. Those rules provide:

'(11) The court may, during the course of any proceedings, order the production by any party thereto under oath of such documents or tape recordings in his power or control relating to any matter in question in such proceeding as the court may think meet, and the court may deal with such documents or tape recordings, when produced, as it thinks meet.

(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape

recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding, provided that any other party may use such document or tape recording.'

If a document is produced which supports the plaintiff credit provider's case, it cannot be handed in or relied upon by the plaintiff for the reasons already discussed; but if no such document is forthcoming, or a document is produced which is defective (eg the address or telefax number is wrongly stated) the document or its absence can be relied upon by the defendant consumer as evidencing non-compliance with the notice provisions of the Act.

[49] I now intend considering whether the Bank has proved that it complied with the notice provisions of s 130(1) read with s 129(1) of the Act. I am not satisfied that it has. The summons contains the following allegations:

'The plaintiff is a registered credit provider as defined in terms of s 40 of the National Credit Act, 34 of 2005 and has complied with s 129(1) and 130 of the said Act. Copies of the notices in terms of the aforementioned sections are annexure to as 'A' and 'B' respectively'.

[50] Annexure A is dated 23 April 2009 and headed 'Notice in terms of s 129(1) of The National Credit Act, 34 of 2005'. The notice was addressed to the appellants at the address referred to in the summons. Had it been 'delivered' this would have constituted compliance with s 130(1) read with s 129(1) of the Act.

[51] Annexure B is dated 15 May 2009 and headed 'Certificate of compliance in terms of s 129(1) of The National Credit Act, 34 of 2005 ("the Act")'. In this document the Manager ─ Foreclosure of the Bank has said inter alia:

'4. A notice in terms of Section 129(1) of the Act was issued to the client/s on 23 April 2009.

5. At least 10 (TEN) business days have elapsed since the Bank delivered the notice.'

[52] There is no allegation in the summons or the certificate of compliance, annexure B (which is not 'a notice in terms of s 130', as the summons describes it) that annexure A, the notice in terms of s 129, was sent by any of

the methods prescribed in s 65(2) of the Act. The submission on behalf of the Bank was that the notice was sent by registered post. But that is nowhere averred in the summons or annexures thereto.

[53] The summons alleges that the Bank has complied with sections 129(1) and 130 of the Act. That is a bald conclusion of fact (that something was done) and law (that what was done, complied with the statutory prescripts). The method of compliance ─ there are six in s 65(2) ─ has not been specified and the court cannot accordingly determine whether there has indeed been delivery in terms of the Act. It is true that annexure A, the notice in terms of s 129, is addressed to the appellants. But that is not to say that it was posted, or delivered in some other way as contemplated in s 65(2).

[54] The statement in annexure B that 'a notice in terms of s 129(1) of the Act was issued to the client/s' neither amounts to an allegation that the notice was 'delivered' in terms of the Act nor does it say how this was allegedly done. As paragraph 5 of annexure B is concerned with the lapse of the prescribed period and not delivery of the notice, it does not cure the problem. The appellants and the court are left to speculate as to whether there was indeed compliance with the provisions of the Act. That is not sufficient.

[55] Nor does clause 21.3 of the bond assist the appellant. That clause provides:

'21.3 A certificate signed on behalf of the Bank, stating that a notice has been given, shall be sufficient and satisfactory proof thereof, and the authority of the signatory and validity of the signature need not be proved.'

The clause suffices for the purposes of the contract; but (leaving aside the fact that an allegation that a notice has been 'given' would not amount to an allegation that the notice had been 'delivered in terms of the Act'), a court must still be satisfied that a credit receiver has received the protection afforded by the Act. If justifiable concern exists that this has not been done, the court should exercise its discretion in terms of rule 32(5) to refuse summary judgment as the Act provides, in terms, in s 130(3) that:

'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 . . . .'

[56] I wish to make two observations in regard to the choice of the method of delivery of documents in terms of s 65(2) of the Act. The first is that the bond provides in clause 21.1 that:

'Any notice given by the Bank in terms of this bond may at the Bank's option be addressed to the mortgagor at the domicilium referred to in clause 20 or to the mortgagor's last postal address recorded with the Bank and may be served by registered post.'

One of the options a consumer may choose for delivery of a notice in terms of s 65(2) is ordinary post. But to be effective, the notice would have to comply both with the contract and with the Act. The notice would therefore have to be sent by registered post to comply with the contract. Section 65(2)(a)(i) of the Act only requires 'ordinary mail'. But the greater includes the lesser. As Wessels JA said in *Maharaj v Tongaat Development Corporation (Pty) Ltd*:[12]

'In prescribing a method whereby the seller is required to send a letter to the purchaser by registered post, the Legislature no doubt accepted that that method is almost invariably employed where important letters or other documents are sent to an addressee through the post. Whilst registered letters no doubt do go astray, there is, at least, a high degree of probability that most of them are delivered.'

In the present matter, therefore, sending by registered post would be both necessary and sufficient. However, had the appellants chosen another method of delivery in terms of s 65(2), the Bank would have had to comply with that choice and send the notice by registered post as well. I emphasize that the Act in s 65(2)(b) obliges the Bank to deliver the notice in the manner chosen by the consumer from the options in paragraph (a) of that section. The Bank cannot reserve other options to itself.

[57] The second observation is this. Section 3 of the Act states that one of its purposes is to protect consumers by:

'(e) Addressing and correcting imbalances in negotiating power between consumers

12 1976 (4) SA 995 (A) at 1001A-B.

and credit providers by ─

(i) providing consumers with education about credit and consumer rights;
(ii) providing customers with adequate disclosure of standard information in order to make informed choices . . . .'

Unless credit providers inform consumers of their options in terms of s 65(2), the benefits of that section are likely to remain illusory rather than real. A consumer could hardly complain if the method of delivery of a document chosen by him or her proves ineffective. But for so long as credit providers employ standard form contracts which make provision for one possibility only ─ in the present matter, a notice sent by registered post to an address (which, in the absence of an address specified, will be the address of the mortgaged property) ─ the argument loses sight of reality. Credit providers should accordingly not complain if courts require compliance to the letter with both the Act and the terms of credit agreements, or approach with a leery eye standard form certificates of compliance coupled with contractual provisions similar to clause 21.3 of the bond quoted above.

[58] I therefore concur in the order proposed by my colleague Maya JA.

_____

T D CLOETE
JUDGE OF APPEAL

APPEARANCES:
For appellants: MC Erasmus SC (with him DJ Van Heerden)
Instructed by De Buys Human, Pretoria
Symington & De Kok, Bloemfontein
For Respondent: C da Silva SC (with him AP Ellis)
Instructed by Friedland Hart Solomon Nicholson, Pretoria
Webber Attorneys, Bloemfontein