Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 5283/2016

Before: The Hon. Mr Justice Binns-Ward

Hearing: 31 January 2017
Judgment: 23 February 2017

In the matter between:

RIAAN MOGAMAT AMARDIEN	First Applicant
AND ELEVEN OTHERS	Second to Twelfth Applicants

and

THE REGISTRAR OF DEEDS	First Respondent
SHAUN WINGERIN N.O.	Second Respondent
GRAEME MICHAEL SCKOLNE N.O.	Third Respondent
NICOLA MARTINE COHEN N.O.	Fourth Respondent
THE CAPE TOWN COMMUNITY HOUSING COMPANY (PTY) LTD	Fifth Respondent

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JUDGMENT

BINNS-WARD J:

[1] In this matter the applicants, who were 12 purchasers of immovable property in terms of contracts of sale of land on instalments, have applied for orders (i) declaring the action of the seller (the fifth respondent, the Cape Town Community Housing Company (Pty) Ltd) in

having cancelled the contracts to have been unlawful, (ii) setting aside the cancellation by the first respondent (the Registrar of Deeds) of the recording of those contracts and (iii) declaring the subsequent sale of the properties by the fifth respondent to the second to fourth respondents as trustees of the S & N Trust to have been unlawful, and hence void. There are in effect 12 separate applications that have been brought together under one set of papers for convenience. It is accepted that if the applicants succeed in obtaining the first of the aforementioned orders, the cancellation of the recording of the contracts would fall to be set aside. Section 20(2)(b) of the Alienation of Land Act 68 of 1981 prohibits the transfer of land to any person other than the instalment sale purchaser while the contract is recorded, or, if the purchaser is an 'intermediary' (as defined) to a 'remote purchaser' (as defined), to the intermediary. No relief was sought in the current proceedings in respect of the transfer of the properties to the trust.

[2] The issue centrally in contention therefore is the validity of the cancellation of the contracts. In that regard three matters arise on the papers for determination. Firstly, whether the applicants had been in breach of their payment obligations under the contract, as maintained by the fifth respondent. Secondly, whether the applicants were given notice in terms of s 129 of the National Credit Act 34 of 2005 ('the NCA') before the contracts were cancelled. And thirdly, whether, assuming notice in terms of the NCA had been given to them, the extent of the applicants' respective arrears had been indicated. In regard to the latter question, the applicants have alleged that the extent of their alleged arrears was omitted from the letters addressed to them in terms of s 129 of the NCA, with the result (so it was argued) that the notices had been legally ineffectual for want of compliance with the requirements of s 129 of the NCA and/or s 19 of the Alienation of Land Act.

[3] It bears mention, by way of historical background, that the fifth respondent had previously obtained eviction orders against the applicants in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998, having purported to cancel the contracts by reason of the applicants' default in payment. The applicants, however, successfully appealed against those orders on the basis that the fifth respondent had not been entitled to payment by reason of the contracts not having been recorded in terms of s 20 of the Alienation of Land Act.[1] The current proceedings arise out of further cancellations of the contracts after they had been recorded.

[1] Section 20(1) of the Alienation of Land Act provides:

[4] The sale of the properties to the S&N Trust occurred after the recordals had been cancelled by the Registrar of Deeds at the instance of the fifth respondent after the further cancellations of the contracts. It does not appear on the papers that the fifth respondent gave notice of its further cancellation of the contracts to the applicants, but the application (in terms of paragraph 2 of the notice of motion) for a declaratory order that the purported cancellations were unlawful implies an acceptance by the applicants that acts of cancellation did occur.[2] (It may be that the applicants accepted the letters they subsequently received from the trust's attorneys demanding that they vacate the properties as effectively haven given them notice of the cancellation of the contracts.[3] The position is unclear on the papers. Certainly, however, the applicants have not contended that the purported cancellations were ineffectual by reason of their not having been communicated by the fifth respondent to the purchasers.)

[5] The S&N Trust instituted eviction proceedings against the applicants in the Mitchell's Plain magistrates' court. Those proceedings appear to have been suspended pending the

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(1) (a) A seller, whether he is the owner of the land concerned or not, shall cause the contract to be recorded by the registrar concerned in the prescribed manner provided a prior contract in force in respect of the land has not been recorded or is not required to be recorded in terms of this section.

(b) If a period of 90 days from the date-

(i) of the contract, if the land is registrable; or

(ii) upon which the land becomes registrable; or

(iii) upon which the land is registered in the name of a purchaser in terms of a preceding contract which was or was required to be recorded in terms of this section,

has expired without the seller having caused the contract to be recorded in terms of paragraph (a), the purchaser may-

(aa) within 14 days after such expiry cancel the contract, in which case the parties shall be entitled to the relief provided for in section 28 (1): Provided that nothing in this subparagraph contained shall detract from any additional claim for any damages which the purchaser may have; or

(bb) at any time thereafter, if he does not cancel the contract under subparagraph (aa), apply to the registrar concerned to record the contract in the prescribed manner: Provided that should a purchaser exercise his right to cause a contract to be recorded in terms of the foregoing provisions of this subparagraph, he shall not be liable for any wasted costs arising from the seller also having taken steps or taking steps to have such contract recorded.

(c) If a contract recorded in terms of this section is terminated for whatever reason, such recording shall be cancelled in the prescribed manner.

[2] A copy of the application by the fifth respondent to the Registrar of Deeds for the cancellation of the recording of the contract to which the first applicant was party was annexed to the applicants' founding papers. The application includes an affidavit by the acting chief operations officer of the fifth respondent (who was also the deponent to the fifth respondent's principal answering affidavit) in which he avers '*The contract of the sale of the property has been terminated as a result of a breach of contract by the purchasers*'.

[3] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] 1 All SA 581 (A), 2001 (2) SA 284, at para. 29, affords authority for the proposition that notice of a contracting party's election to cancel the contract may effectively be given by a third party; see also GB Bradfield (original text by RH Christie), *The Law of Contract in South Africa*, 7th ed. at p. 637.

determination by this court of the current application. The trustees have chosen not to take an active part in the current proceedings and delivered a notice of intention to abide the judgment of the court.

[6] Sales of land on instalments are regulated in terms of Chapter II of the Alienation of Land Act 68 of 1981. For current purposes it is relevant to note that the Act makes provision, in s 20,[4] for the recording of instalment sale contracts. Recording of contracts is effected by Registrar of Deeds at the instance of the seller, provided that if the seller does not do so within the statutorily stipulated period, the purchaser may either cancel the contract within 14 days of the expiry of the period, or at any time thereafter itself apply to the Registrar to have the contract recorded. The purpose of recording the contract is to afford certain protections to the purchaser. Section 26(1)(b) of the Act provides - subject to certain exceptions in terms of subsection (3) that are not applicable on the facts of the current matter - that no person shall receive any 'consideration' by virtue of a deed of alienation in respect of a sale of land on instalments until the recording of the contract required in terms of s 20 of the Act has been effected.[5]

[7] The term 'consideration' is specially defined in s 1 of the Alienation of Land Act. It means: '*in relation to a sale of land under any deed of alienation, … the purchase price and interest thereon, excluding rent or occupational interest constituting a reasonable compensation for the use and enjoyment of the land by the purchaser*'. The only section of the Act in which the word 'consideration' is employed is s 26.

[8] The contracts in question were entered into on various dates in or about 2000. It was only in April 2014, however, that they were recorded. Despite the provisions of s 26 of the Act, the applicants made certain payments towards the purchase prices. There were issues concerning the quality of the building of the houses that had been constructed on the properties. In the course of addressing them the seller caused certain remedial work to be undertaken and entered into variation agreements in respect of the purchase prices in terms of a so-called 'affordability scheme'. Notwithstanding that the terms of the contracts

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[4] See note 1

[5] Section 26(1)(b) of the Alienation of Land Act provides:

> *No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until-*
> *(a) …*
> *(b) in case the deed of alienation is a contract required to be recorded in terms of section 20, such recording has been effected.*

contemplated that the properties would have been paid for and transferred within a matter of four years, that did not happen because of the suspension by the applicants of their payments. The applicants assert, however, that they are not in breach of the agreements because, by virtue of the provisions in the Act to which I made reference above, no consideration had become payable until the recordal of the contracts in April 2014. The fifth respondent, on the other hand contends that whereas the instalments may not have become payable until the contracts had been recorded, that did not prevent them falling due in accordance with the terms of the contracts. The seller's contention was thus that the accrued amounts outstanding under the contracts became immediately due and payable upon the recording of the contracts.

[9] In my judgment the seller's contention is well-founded. The provisions of ss 20 and 26 of the Act are not directed, according to their tenor, at affecting the terms of the agreements. They do not affect when payment falls due under the contract. Section 26(1) is directed only at excluding the seller's right to recoup any payment in terms of the contract until it has done what is necessary to afford the purchaser the protection that the legislature intended to be provided consequent to the recording of the contract. Section 26 is clearly framed in a manner designed to serve as an incentive to sellers to attend promptly to the recording of the contracts. But apart from the prohibition on the receipt of consideration until the recording has been done, the statutory provisions do not impact on the terms of the agreement. Indeed, the prohibition on the receipt of consideration falls away if the purchaser, as it is entitled to do, obtains the recording of the contract. The statutory provisions provide an incentive to both parties to do what is necessary to achieve the statutory protections that follow upon the recording of the contract. The object of the statutory protections afforded to purchasers of land on instalments is societal in character, not contractual.

[10] That the provisions are not directed at derogating from the integrity of the contract is highlighted, I think, by the fact that the purchaser is afforded only a very limited opportunity to cancel the agreement if the seller fails to attend to the recording of it timeously. If the purchaser elects not to cancel within the given 14 day- period, or just omits to do so, it remains bound by the contract according to its tenor.

[11] If the statutory object had been that no amount should fall due under the contract until it had been recorded, one would have expected s 26(1) to have been worded to say that. The prohibition against *receiving* consideration denotes something different: that what the seller cannot do is accept payment of that which has fallen due in terms of the contract until it has

been recorded. A party to a contract ordinarily stands to receive payment under it only when the amount concerned has fallen due.

[12] In my view, the clincher in favour of the fifth respondent's submissions on the proper construction of the provisions is to be found in the definition of 'consideration' (see para. [7] above). It is impossible to conceive why interest on the purchase price should have been included in the defined meaning of 'consideration' if it had been the legislative intention that, irrespective of the terms of the particular agreement, no part of the purchase price should become due before the contract was recorded. Interest could only accrue on an amount that had become due but remained unpaid.

[13] It follows that inasmuch as the applicants were each in arrears in terms of the contracts when the contracts were eventually recorded, they thereupon fell to be regarded as 'in breach' of the contracts for the purposes of s 19 of the Alienation of Land Act, or 'in default' for the purposes of s 129 of the NCA. The contracts were therefore amenable to cancellation by the fifth respondent, subject only to any statutory provisions to which the exercise of the right of cancellation was subject.

[14] Section 19 of the Alienation of Land Act provides that a seller in terms of a contract of sale of land on instalments is not entitled to enforce an acceleration of payment clause under the contract or to terminate the contract or institute an action for damages by reason of any breach of the contract unless the purchaser has been given notice of the breach and has failed, notwithstanding demand, to remedy the breach within a period to be afforded of not less than 30 days of the said notice. It is, rightly, common ground between the parties that the contracts are credit agreements that are subject to the NCA. The object of s 19 is plainly equivalent to that of s 129 read with s 130 of the NCA. The provisions of ss 129 and 130 of the NCA also require the 'credit provider' (i.e. the seller in terms of a sale of land on instalments) to give consumer (i.e. the purchaser) notice of any default in terms of the contract and an opportunity to remedy it before any enforcement measures can be taken. Enforcement measures for the purposes of s 129 of the NCA, includes cancelling the contract by reason of the consumer's default; see s 123(2) of the NCA.

[15] Section 172(1) of the NCA provides: '*If there is a conflict between a provision of this Act mentioned in the first column of the table set out in Schedule 1, and a provision of another Act set out in the second column of that table, the conflict must be resolved in accordance with the rule set out in the third column of that table*'. The Schedule provides

that the provisions of the NCA prevail over those of Chapter II of the Alienation of Land Act to the extent of any conflict. As s 129 of the NCA and s 19 of the Alienation of Land Act inconsistently provide for notice to be given before cancellation for breach of contract can be effected, the effect of s 172(1) of the NCA is that s 129 of the NCA eclipses s 19 of the Alienation of Land Act. The applicants have alleged that the fifth respondent failed to comply with s 129 of the NCA and also with s 19 of the Alienation of Land Act. Their reliance on s 19 is unfounded in the circumstances, and it is only the question of compliance with s 129 of the NCA that requires to be considered.

[16] The applicants allege, firstly, that they did not receive notice from the fifth respondent in terms of s 129 of the NCA and, secondly, that even were it to be found that notice had been given the notices were fatally defective, mainly because, so it was alleged, the notices failed to state the amount by which the respective applicants were in arrears. The applicants' counsel applied during argument that the factual disputes in respect of these matters be referred to oral evidence in the event of the court being unable to resolve them in the applicants' favour on the papers. The fifth respondent's counsel opposed the application for a referral to oral evidence.

[17] In *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) the Constitutional Court held that, in the absence of a '*contrary indication*', it might be accepted that a notice sent by registered post by a credit provider in terms of s 129 had been delivered if it appeared from a post office track and trace report that it had been received at the local post office of the consumer and that notification had been given by the post office to the addressee that the item was available for collection. If, in contested proceedings the consumer avers that the notice did not reach him or her, the court seized of the enforcement proceedings must establish the truth of the claim.[6] The ordinary evidentiary principles concerning the determination of disputes of fact would be applicable. In motion proceedings the so-called *Plascon-Evans* rule[7] would apply in cases, in which, as here, final relief is sought. The Court held it was not incumbent on the credit provider to establish that the notice had come to the subjective attention of the consumer.[8]

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[6] See *Sebola* supra, at para. 87.

[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints Pty Ltd* 1984 (3) SA 623 (A), at 634-5.

[8] *Sebola* supra, at para. 56-58 and 74 and *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) at para. 31

[18] Clarification of the judgment in *Sebola* was afforded in the Court's subsequent judgments in *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC). It was held that the obligation on the credit provider in terms of s 129 to '*draw the default to the notice of the consumer in writing*' is discharged, in the words of s 65(2), by '[making] *the document available to the consumer*'. Mhlantla AJ, who wrote the main judgment, explained '*While a credit provider must take certain steps to ensure that a consumer is adequately informed of her rights, such a credit provider cannot be non-suited or hamstrung if the consumer unreasonably fails to engage with or make use of the information provided. In other words, it is the use of an acceptable mode of delivery - the taking of certain steps to apprise the consumer of the notice - which the statute requires of the credit provider, not the bringing of the contents of the s 129 notice to the consumer's subjective attention*'.[9]

[19] At para. 35-36 of *Kubyana* it was held that in a matter in which notice in terms of s 129 had properly been given by means of registered mail, then if the credit provider established by means of a track and trace report that the registered item had reached the consumer's local post office and notification that it was available for collection had been given to the consumer and no response had been obtained from the consumer within the prescribed period, nothing more could be expected of the credit provider. Mhlantla AJ stated:

> Certainly, the Act imposes no further hurdles and the credit provider is entitled to enforce its rights under the credit agreement. It deserves re-emphasis that the purpose of the Act is not only to protect consumers, but also to create a 'harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements'. Indeed, if the consumer has unreasonably failed to respond to the s 129 notice, she will have eschewed reliance on the consensual dispute resolution mechanisms provided for by the Act. She will not subsequently be entitled to disrupt enforcement proceedings by claiming that the credit provider has failed to discharge its statutory notice obligations.
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> As set out earlier, even if the s 129 notice has been dispatched by registered mail and the Post Office has delivered the notification to the consumer's designated address, valid delivery will not take place if the notice would nevertheless not have come to the attention of a reasonable consumer. But if the credit provider has complied with the requirements set out above, it will be up to the consumer to show that the notice did not come to her attention and the reasons why it did not.
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> (Footnotes omitted.)

It was also noted (at para. 48) that '*It is never the case that an item dispatched by registered mail will physically be delivered to an individual - such delivery only occurs if the item is*

[9] At para. 32.

sent by ordinary mail, which does not suffice for purposes of ss 129 and 130 of the Act. If a consumer elects not to respond to the notification from the Post Office, despite the fact that she is able to do so, it does not lie in her mouth to claim that the credit provider has failed to discharge its statutory obligation to effect delivery'. (Footnotes omitted.)

[20] Dealing with the import of the term '*contrary indication*' employed in the majority judgment in *Sebola* (see para. [17] above), the court in *Kubyana* rejected (at para. 49-53) an argument advanced that it was sufficient, in the face of a track and trace report indicating that the notice had arrived at the her local post office and that notification that it was available for collection had been given, for a consumer baldly to deny having received it. Mhlantla AJ held in that regard that in such circumstances it fell to the consumer to 'explain why it [was] not reasonable to expect the notice to have reached her attention'.[10] At para. 57, the learned Constitutional Court judge articulated the rejection of the argument with reference to the facts of the case, stating '*... 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 s 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*.' It is plain therefore that in the face of a track and trace report from the post office showing that the notice sent by registered mail was received at the consumer's post office and that notification of its availability for collection was given to the consumer, there is, at the very least, a burden on the consumer who asserts that the delivery of the notice was nevertheless ineffectual to adduce evidence to support a conclusion that she could not reasonably have collected or responded to it.

[21] It is accepted in the current matter that the fifth respondent was entitled to give notice in terms of s 129 of the NCA by registered post. This seems to me to have been a correct manner of reconciling the provision with s 19 of the Alienation of Land Act, which, as noted, it substantively overrides. Section 19, which would have been applicable when the contracts

[10] At para. 53.

were concluded, provides for notice of breach to be given by the seller to the purchaser by means of handing it to the purchaser or sending it to him or her by registered post. The contracts themselves also make provision for notice by registered post.

[22] The first applicant made the principal founding affidavit in these proceedings. The other applicants contented themselves with making essentially identical supporting founding affidavits, which, in essence, merely purported to confirm the allegations in the principal founding affidavit. All that the first applicant said in respect of the delivery of notice in terms of s 129 was the following (at para. 60 of his founding affidavit):

> It is alleged that notices in terms of section 129 of the National Credit Act ("the NCA") were sent to each of the Applicants herein, including me. A copy of such notice – allegedly sent by the First (sic) Respondent's[11] attorney, A Parker and Associates, on 25 April 2014 – is annexed marked "**RMA 18**". I deny having received such a notice. Indeed, I deny having received any notification in terms of section 129 of the NCA at all, and place the Respondents to the proof thereof should they deny this allegation.

I think it must be assumed that by their confirmatory affidavits the other applicants intended that their evidence concerning notice to them in terms of s 129 of the NCA was to be understood to be to the same effect as that of the first applicant.

[23] The fifth respondent attached to its answering affidavit copies of the documents that it alleged were sent by registered post to the applicants by way of notices in terms of s 129 of the NCA. Copies of the documents were attached as annexures WJ15 to WJ26 to the answering affidavit deposed to by Mr Werner Jurgens, the acting chief operations officer of the fifth respondent. It is evident that their content also served to advise the addressees that the contracts had been recorded in terms of the Alienation of Land Act. Copies of the track and trace reports by the post office in respect of each of the notices were also annexed as annexures WJ27 to WJ41 to the answering affidavit.

[24] The track and trace reports indicate that save in respect of the first, fourth, eighth, eleventh and twelfth applicants, the notices sent to the applicants at the addresses of the properties they had purchased in terms of the contracts were collected by the applicant (or by a person bearing the applicant's surname). The seventh applicant is the administrator of the deceased estate of the late Latiffa Adams, who had been the purchaser of the property at 3 Jasmine Crescent, Mitchell's Plain. The seventh applicant was appointed as administrator

[11] This was plainly an intended reference to the fifth respondent.

in terms of s 18(3) of the Administration of Estates Act 66 of 1965 in terms of letters of authority from the Master, dated 28 February 2007.[12] Ms Adams, who died in 2006, had taken occupation of the property in 2000 and had lived there with the seventh applicant, who was her son. The notice in terms of s 129 was addressed to Ms Adams, and not to the executor of her deceased estate. It was not argued, however, that the notice - assuming that it had been delivered to the seventh applicant - would not have been effective on account of its having been addressed to the deceased, rather than to the administrator of her estate.

[25] With regard to the first, eighth, eleventh and twelfth applicants, the track and trace reports reflect that the notices were received at the local post office (Lentegeur) and that notifications were sent to the addressees, but that the items were thereafter returned to sender when they had not been collected after being held available for about one month. The notice sent to the fourth respondent was, according to the track and trace report, delivered to 'Varind' three days after notification that it was available for collection had been sent.

[26] The content of the post office track and trace reports is, of course, hearsay. But, on the authority of the Constitutional Court's judgments in *Sebola* supra (at para. 75-78) and *Kubyana* supra (at para. 43 and 53-54), it is ordinarily sufficient in the circumstances described in the two preceding paragraphs to place an evidential burden on the applicants to show that delivery of the notices was not effected. There is nothing in the facts of the current applications that takes them out of the ordinary.[13]

[27] In reply, the applicants responded in a single paragraph to the fifth respondent's aforesaid evidence that notices in terms of s 129 had been duly delivered. It went as follows:

> Save to reiterate that the alleged notices were never received by us; the contents of these paragraphs [i.e. paragraphs 44-46 of the fifth respondent's answering affidavit under cover of which the track and trace reports were attached] are noted. We further note the following aspects of exhibits WJ27 to WJ41: my letter WJ15 was addressed to 39 Jeanne Crescent but at the time of posting my house was numbered 43 – it was renumbered 39 in 2016; second applicant's letter WJ16 likewise was sent to number 53 whereas her home at the time of the posting was number 57 and was recently renumbered 53 in 2016. We further note that the letters purportedly posted to us were dated 25 April 2014 but were only received by the Cape Mail from 21 May 2014 onward.

[12] The seventh applicant averred that his sister is co-administrator of the estate. The letters of authority from the Master that was attached to the papers do not bear out the averment, however. They reflect the seventh applicant as the sole appointee. If the seventh applicant were only a co-administrator, his application would have been fatally defective, having been brought by himself alone and not by both administrators acting jointly.

[13] Proof of delivery by registered post is now regulated in terms of s 129(7)(a) of the NCA, which was inserted in the Act in terms of the National Credit Amendment Act 19 of 2014 with effect from 13 March 2015.

[28] If the street number addresses of the first and second applicants were indeed changed only in 2016, it was remarkably prescient of the fifth respondent's attorneys to have used the new street numbers in 2014. It is unexplained how the attorneys could have used the new street numbers if they had not come into effect in 2014. It is improbable that it could be coincidental that the allegedly incorrect numbers used for the first and second applicants' addresses were actually allocated to those addresses two years later. (The fifth respondent contests that the change of street numbers occurred only in 2016. It says the addresses used were taken from the City of Cape Town's billing records. A copy of an August 2015 property rates account addressed by the City in respect of Erf 50792 – the property purchased by the second applicant – giving the street address as **53** Jeanne Crescent was put in under a 'further affidavit' by Mr Jurgens, *jurat* 31 January 2017, without objection.) The applicants' reply furthermore offers no explanation how the track and trace report reflects that the item addressed to the second applicant at 53 Jeanne Crescent was collected by a person bearing her surname.

[29] The s 129 notices to the applicants were all dated 25 April 2014, but it is apparent from the faintly visible Cape Mail stamp on the bottom right of annexures WJ27 and WJ28 to the fifth respondent's answering affidavit in the court's set of the papers that the letters were posted only on 21 May 2014. It is evident that WJ29 was also stamped, but the stamp is totally illegible. In fact the signs of its existence are barely visible. (Annexure WJ29 is relevant only in respect of the postage of a registered item by the fifth respondent's attorneys to the ninth applicant.[14])

[30] In my judgment the applicants' averments have been insufficient in the circumstances to displace the prima facie effect of the fifth respondent's evidence, supported by the track and trace reports, that notices in terms of s 129 were given to the applicants and that there was a reasonable opportunity afforded for such notices to come to their subjective attention. That conclusion has been underscored, in the context of the applicants' election to have proceeded in motion proceedings, by the incidence of the *Plascon-Evans* rule. As mentioned, the applicants requested that in the event of the court being inclined to such a conclusion on the papers the issue be referred for determination on oral evidence. I shall treat of that application presently.

[14] The notice was addressed to CR & AD Cloete.

[31] There is also a dispute of fact as to whether the notices included particulars of the amounts by which each of the respective applicants was in arrears. That question also falls to be determined adversely to the applicants on the *Plascon-Evans* rule and is also the subject of the application for a referral to oral evidence. That possibility need only be considered, however, if the fifth respondent had been bound to include the information in the notices.

[32] The fifth respondent's counsel sought support in the judgment of the late Appellate Division in *Phone-A-Copy Worldwide (Pty) Ltd v Orkin and Another* 1986 (1) SA 729 (A) for his submission that, were such fact to be established, the omission of the amount of the arrears would not detract from the validity and effectiveness of the s 129 notices.

[33] *Phone-A-Copy*, insofar as relevant, concerned compliance with the requirements of s 13(1) of the Sale of Land on Instalments Act 72 of 1971, which was the statutory predecessor of s 19 of the Alienation of Land Act. The subsection provided as follows:

> No seller shall, by reason of any failure on the part of the purchaser to fulfil an obligation under the contract, be entitled to terminate the contract or to institute an action for damages, unless he has by letter handed over to the purchaser and for which an acknowledgement of receipt has been obtained, or sent by registered post to him at his last known residential or business address, informed the purchaser of the failure in question and made demand to the purchaser to carry out the obligation in question within a period stated in such demand, not being less than 30 days, and the purchaser has failed to comply with such demand.

[34] After the purported cancellation of the contract in issue in that matter, the purchasers contended that the notice given by the sellers in terms of s 13(1) failed to comply with the requirements of the provision '*in that it did not inform them of what they were required to do in order to avoid the consequences of default; more specifically, they complained that it was not possible for them to establish or calculate the balance outstanding "in respect of the purchase price and all interest due under the deed of sale" to enable them to comply with the demand*'.[15] The court rejected the contention, holding (per Nicholas AJA):

> … It was only if the notice had been in such terms as to make it difficult for the plaintiffs to understand the details of what was demanded from them that it might be said that they had not received such notice as was contemplated by the section ... .
>
> In terms of s 13(1) it was necessary for the seller to inform the purchaser of the failure to fulfil any obligation under the contract. That it did: it informed them of the failure to pay … the balance of the purchase price and interest. What that balance was, was as readily capable of ascertainment by the purchasers as it was by the seller. The seller demanded that the purchasers carry out that obligation

[15] *Phone-A-Copy* supra, at p. 750F.

> within the period of 30 days. When they failed to comply with the demand, the seller became entitled to terminate the agreement.[16]

[35] Section 13(1) of the Sale of Land on Instalments Act, 1971, was one of two comparable statutory provisions to which the Constitutional Court had regard in its consideration of the import of s 129(1) read with s 130 of the NCA in *Sebola*.[17] In the course of his discussion of the comparable provisions, Cameron J, writing for the majority, referred to the judgment in *Phone-a-Copy* without qualifying anything that had been said in it. He remarked in that connection (at para. 133), '[t]*here can be no doubt that both ss 12(b)* [of the Hire Purchase Act 36 of 1942] *and 13(1) sought to address the same problem, namely, the procedure to be followed and the conditions that had to be met before the seller could act in one way or another when the buyer was in breach of the agreement between the parties. There can also be no doubt that under both provisions the seller was required to bring the breach or default to the notice of the buyer or purchaser in writing, and had to afford the buyer a period of at least 10 days to enable the latter to remedy the breach or bring the payments up to date before he could institute legal proceedings or before he could terminate the agreement. It must be noted that those features, which were present in ss 12(b) and 13(1), are also present in ss 129(1)(a) and (b) read with s 130(1). I now consider how the courts interpreted s 13(1) of the 1971 Act*'. It is evident, however, that the focus of the comparative exercise undertaken by learned judge was on the issue of the effectiveness of delivery of the notice rather than the extent of detail required in its content.

[36] Section 129(1) of the NCA provides as follows insofar as relevant:

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

[16] Ibid at 750G-I.

[17] *Sebola* supra, at para. 124-137.

(The only relevance of s 130 of the NCA to the question now under consideration is that it affords the consumer a period of time to take corrective measures before the credit-provider is able to take 'enforcement' action.)

[37] The '*significantly consumer-friendly and court-avoidant*' character of the requirements of s 129 was emphasised by the Constitutional Court in *Sebola*. Cameron J held that notice procedure was '*designed to help debtors to restructure their debts, or find other relief, before the guillotine of cancellation or judicial enforcement falls*'.[18]

[38] Any determination of the requirements of s 129 has to be undertaken in accordance with the interpretative approach enjoined in s 2 of the Act; viz. '*in a manner that gives effect to the purposes set out in section 3*'. Section 3 of the NCA provides:

> 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 historically been unable to access credit under sustainable market conditions;
>
> *(b)* ensuring consistent treatment of different credit products and different credit providers;
>
> *(c)* promoting responsibility in the credit market by-
>
> (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
>
> (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
>
> *(d)* promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
>
> *(e)* addressing and correcting imbalances in negotiating power between consumers and credit providers by-
>
> (i) providing consumers with education about credit and consumer rights;
>
> (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
>
> (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
>
> *(f)* improving consumer credit information and reporting and regulation of credit bureaux;
>
> *(g)* 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;
>
> *(h)* providing for a consistent and accessible system of consensual resolution of disputes arising

[18] Ibid para. 59.

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.

[39] The applicants' counsel did not refer to any authority in support of the argument that particulars of the arrears was an essential ingredient of a notice of default in terms of s 129 of the NCA. There is also nothing in the wording of the provision or the regulations that expressly requires that. I am also unable to find that the legislative purposes set out in s 3 of the Act would be frustrated if the requirement that the arrears be particularised were not imputed. It may be desirable that the information be given, but that is a different thing from it being essential.

[40] In *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi Inc* 2009 (3) SA 348 (B) (a summary judgment case in which the defendant was given leave to defend the action), the opinion was expressed[19] that *'...credit providers arguably tend to adopt a cold, mechanical and disinterested approach in the course of purporting to comply with the provisions of s 129(1)(a). It could be argued that they merely reproduce the provisions of this subsection and add no flesh or substance to them, to make them alive and understandable to their clients. There is also room for the view that credit providers like the plaintiff* [a motor finance company], *who seem to have the resources, are possibly expected to make s 129(1)(a) understandable and practical to their debtors. A message to the effect that, if the debtor cannot cope with the current instalment, he/she should approach the credit provider or a credit counsellor to talk about what could be done to prevent drastic action like repossession and a lawsuit being taken against it/him/her, would possibly be considered more as a proposal than the mere regurgitation of a portion of s 129(1)(a). A simplified and more practical version of s 129(1)(a), set out in the notice, would possibly help a person in the position of the defendant, given the general history of prompt payment, including for the two months after the notice had been sent in August, to have been able to avoid these proceedings being taken against it. All this depends on the willingness and commitment, by especially the credit provider, to embrace the spirit of the Act. I do not think the intention of the lawmaker was merely to have the credit provider reproduce s 129(1)(a) without any flesh being added to the skeleton that it appears to be. Clearly, the intention was to propose, which presupposes bringing some thinking to bear upon the section rather than a dry and mechanical*

[19] At para. 13.

reproduction of the subsection'. The applicants' complaint, if it were factually well-founded, might find support in these remarks.

[41] However, the difficulty, with respect, with the approach in *Dr MB Mulaudzi* is that it leaves the credit providers' obligations and the corresponding rights of the consumers vague and undefined. That is irreconcilable with the expressly provided statutory objectives of consistent treatment of credit providers and the establishment of a consistent and harmonised system of debt enforcement and judgment. It would imply that the credit providers' obligations in respect of the content of s 129 notices would fall to be established incrementally by the views of judges on the nature and extent of the 'flesh or substance to be added to the skeleton'. As it is, the history of the judicial treatment of many of the express provisions in the Act has been notably disharmonious – due in large part to the defective draftsmanship that characterises the statute. One can only imagine how less certain its provisions would be if it were incumbent on the courts to determine on an ad hoc basis how the express provisions should be fleshed out. The approach in *Dr MB Mulaudzi* was referred to and not followed in *Standard Bank of South Africa Ltd v Maharaj t/a Sanrow Transport* 2010 (5) SA 518 (KZP). I respectfully associate myself with the comment at para. 6-13 of the latter judgment. Compare also the criticism of *Dr MB Mulaudzi* in JM Otto, *The National Credit Act Explained*, 4th ed., at pp.116 fin – 117: '*Had the legislature wanted to put "flesh or substance" to section 129(1)(a), it could easily have regulated the matter in that section itself or in the regulations to the Act*'.

[42] As noted in *Phone-a Copy* supra, the applicants were, notionally at least, in as good a position to determine for themselves how much they owed under the contracts. But if they were uncertain, the notice afforded them the opportunity either directly or through an intermediary such as a debt counsellor, alternative dispute resolution agent or an attorney, to make the necessary enquiries and engage with the substantive issue. The object of the notices was to allow the applicants to avoid the guillotine of enforcement proceedings or cancellation falling by engaging with the fifth respondent before it happened. Had they so engaged with the fifth respondent, the latter would have been bound in terms of the Act to respond in a bona fide manner. If the amount of the arrears was information that was lacking and required by the applicants, the fifth respondent would have been bound to provide it on request. But the applicants would not have been entitled to ignore the notices they were given merely because, on their version of the facts, the arrears were not particularised. As emphasised in *Kubyana* supra, the NCA is not a one-sided consumer protection law. The Act is expressly

directed at promoting responsible behaviour by consumers with a view to the fulfilment of their contractual obligations in respect of redeeming responsibly extended credit. I can find no reason in the circumstances to conceptually distinguish the requirements of s 129(1) in the relevant respect from those expressed in respect of s 13(1) of Act 72 of 1971 in *Phone-a-Copy* described above.[20]

[43] In the light of the conclusion to which I have come that it was not essential that the s 129 notices set out the amounts in which the applicants were in arrears, it is unnecessary to consider their application that the dispute of fact on that issue be referred to oral evidence.

[44] In opposing the application for the referral of the question of whether the notices were effectively delivered to oral evidence, the fifth respondent's counsel argued that the application should not be entertained as it should have been made at the outset and not advanced as a contingent fall-back position. He also submitted that the application should be dismissed in any event as there had been no indication in support of it that oral evidence would affect the probabilities as they appeared on the papers.

[45] In regard to the first of the aforementioned points, Mr *D.C. Joubert* SC for the fifth respondent called in aid the judgment of the full court in *De Reszke v Maras and Others* 2006 (1) SA 401 (C), at para. 33, in which Comrie J made the following observation:

> Some younger counsel, in particular, seem to take it half for granted that a court will hear argument notwithstanding disputes of fact and, failing success on such argument, will refer such disputes, or some of them, for oral evidence. That is not the procedure sanctioned by the Supreme Court of Appeal. On the contrary, the general rule of practice remains that an application to refer for oral evidence should be made prior to argument on the merits. The Supreme Court of Appeal has widened the exceptions to this general rule, but they remain exceptions

Comrie J's observation was endorsed by the Supreme Court of Appeal (per Harms DP) in *Law Society, Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA), at para. 23. The notion that a belated or contingent application for referral should be considered only exceptionally derives from the remarks of Didcott J in *Hymie Tucker Finance Co (Pty) ltd v Alloyex (Pty) Ltd* 1981 (4) SA 175 (N) at 179D, quoted with approval by Corbett JA in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A), at 981F.

[46] The factual context of the application for a referral to oral evidence in *De Reszke* was starkly distinguishable from that of the application in the current matter. In *De Reszke* the

[20] See paragraph [34] above.

application was made for the first time on appeal. As Comrie J noted immediately prior to the passage from para. 33 quoted above, the Appellate Division had in earlier judgments commended a flexible approach to applications to refer disputes of fact in motion matters for determination on oral evidence. Comrie J quoted the words of Botha JA in *Administrator, Transvaal and Others v Theletsane and Others* 1991 (2) SA 192 (A) at 200C in this respect:

> The recent tendency of the Courts seems to be to allow counsel for an applicant, as a general rule, to present his case on the footing that the applicant is entitled to relief on the papers, but to apply in the alternative for the matter to be referred to evidence if the main argument should fail: see *Marques v Trust Bank of Africa Ltd and Another* 1988 (2) SA 526 (W) at 530E - 531I and *Fax Directories (Pty) Ltd v SA Fax Listings CC* 1990 (2) SA 164 (D) at 167B - J. It seems to me that such an approach has much to commend itself, for the reasons stated in the last-mentioned two cases, but for the purposes of the present case there is no need to pursue the point.

[47] The relevant passages in the two provincial division judgments referred to by Botha JA reflect a judicial policy in favour of entertaining applications for oral evidence contingently on the outcome of argument on the papers where it is fair in the circumstances to do so. In other words a beneficent view will be taken of such applications in circumstances in which it was reasonable for the party concerned to have elected to argue the case on the basis that it might come home on the papers, reserving its position in respect of oral evidence for the contingency that the court concludes that the matter cannot be so decided on the papers. A case in which it should have been clearly evident from the outset that oral evidence would be required does not so qualify.

[48] In the current matter it is apparent from the founding affidavit that the applicants were aware when they instituted the proceedings on motion that the fifth respondent's position was that it had delivered notices in terms of s 129 of the NCA. It was in the context of such knowledge, and having obtained copies of the documents, that the applicants raised the point about the alleged defects in the content of the notices. The applicants, who were legally represented, must be taken to have been aware of the Constitutional Court jurisprudence referred to earlier concerning the prima facie effect of track and trace reports indicating that the notices had reached their local post office and been notified as available for collection. They must accordingly have appreciated when they instituted the proceedings that there would be a dispute of fact concerning delivery of the notices and that they would bear the evidential burden, in the face of track and trace reports suggesting that the notices had been made available for collection or had indeed been collected, to prove that they had had no reasonable opportunity to have received the notices. Inasmuch as they could not have

obtained the track and trace reports without knowledge of the relevant parcel numbers, they could have obtained these from the fifth respondent's representatives, just as they obtained copies of the notices themselves.

[49] Having elected to proceed on motion in the face of what I consider to have been a manifestly foreseeable material dispute of fact, the applicants, moreover, failed, when the foreseeable situation actually eventuated, to adumbrate in their replying affidavits the oral evidence that they would seek to adduce to rebut the prima facie effect of the track and trace reports. The replying affidavits represented no advance on the bald denial of receipt set forth in the founding papers. There is, for example, no indication that the applicants have sought to investigate with the post office the underlying records that must have informed the content of the track and trace reports. In the absence of a cogent indication of what the oral evidence that the applicants would lead would be, I am, with one exception, not inclined to exercise the court's discretion in favour of granting the application for a referral of the question of delivery to oral evidence.

[50] Turning briefly to the application for the review and setting aside of the cancellation of the recordings of the contract by the first respondent. As mentioned, it is not clear when the cancellations of the contracts were conveyed to the applicants. It may be that the recordings were cancelled before the applicants' notice had been brought to the cancellation of the contracts. It is trite that a cancellation of a contract is effective only when the act of cancellation has been notified to the guilty party. Therefore if the recordings of the contracts were cancelled before the applicants had been informed of the cancellations, that would have been unlawful. That was not the case that the applicants advanced, however. But even had the cancellations of the recordings been premature, no point would be served by setting them aside because the fifth respondent would be entitled immediately to have them cancelled again.

[51] The result is that, save in respect of the applicant that is the subject of the aforementioned exception (the first applicant), the applications will be dismissed.

[52] In the case of the first applicant it is uncertain whether the notice in terms of s 129 did not come to his notice because it was directed to the wrong address. If the applicant's evidence that his address was not 39 Jeanne Crescent at the time the notice was addressed to him is established in a trial of the question that might bear out his claim not to have received notification that the registered item was available for him to collect. As mentioned, I

consider that it is inherently unlikely that the fifth respondent could have anticipated the street number change by two years, but in the interest of justice, I consider that the first applicant should be afforded the opportunity of establishing the fact he alleged in this narrow respect. The position of the second applicant, who also raised the number change issue, is distinguishable because in her case the track and trace report suggests that she or a person with her surname actually collected the item, and she has failed to adumbrate in her papers what evidence she might be able to adduce to displace the prima facie effect of the indication that she or a family member collected the registered item. In her case there is also the City of Cape Town rates account mentioned earlier.[21]

[53] Finally, I must deal with an application to strike out quite extensive parts of the fifth respondent's answering affidavit on the grounds that the content was inadmissible hearsay. Mr *Smalberger* SC, who appeared *pro bono* (together with Ms *Matsala*) for the applicants, while he did not abandon the application, chose not advance any argument in support of it. I do not propose to discuss the striking out application in any detail. Suffice it to say that most of the paragraphs in the answering affidavit to which objection was taken related to questions concerning the defects in the housing when it was occupied and the remedial measures taken in that regard. Those questions were not relevant to the issues that fell for determination. The other matters in some of the impugned paragraphs that were of tangential relevance were of such a nature that I would have been inclined to admit the evidence in terms of s 3(1)(c) of the Law of Evidence Act 45 of 1988. The deponent may not have been in the fifth respondent's employ at the time, but there is no reason not to think that, as acting chief operations officer, he would not have been able to apprise himself of the facts from the company's records. It is unnecessary, however, for me to expatiate on the matter because, even assuming that the striking out application were to have been decided entirely in the applicants' favour, it would have made no difference to the result in the principal proceedings. In the circumstances I have found it unnecessary to decide the striking out application. The costs attending it must be negligible.

[54] As the proceedings are in effect 12 individual applications I consider that it would be appropriate that each of the unsuccessful applicants should bear responsibility for the fifth respondent's costs on an aliquot share basis, rather than jointly and severally.

[55] The following order is made:

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[21] At para. [28] above.

1. No order is made in respect of the applicants' application to strike out passages in the fifth respondent's answering affidavit.

2. The applications of the second to twelfth applicants are dismissed.

3. The second to twelfth applicants shall each be liable severally for one twelfth of the fifth respondent's costs of suit.

4. The application of the first applicant is postponed for the hearing of oral evidence before me on a date to be arranged within 10 days hereof through my registrar solely on the issue of whether the notice in terms of s 129 of the National Credit Act 34 of 2005 was correctly addressed to him at 39 Jeanne Crescent, having regard to the allotted street numbers in place in May 2014.

5. The evidence shall be that of any witnesses whom the first applicant or the fifth respondent may elect to call, subject, however, to what is provided in para. 6 hereof.

6. Neither party shall be entitled to call any witness unless:
   (a) it has served on the other party at least 10 days before the date appointed for the hearing (in the case of a witness to be called by the respondent) and at least 10 days before such date (in the case of a witness to be called by the applicant), a statement wherein the evidence to be given in chief by such person is set out; or
   (b) the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.

7. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not; either party may also issue subpoenas *duces tecum*.

8. The fact that a party has served a statement in terms of para. 6 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

9. Within 15 days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issue referred to in para. 4 hereof, which are or have at any time been in the possession or under the control of such party.

10. Such discovery shall be made in accordance with Uniform Rule 35 and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

11. In the event of arrangements not having been made for the further hearing of the first applicant's application as provided in terms of paragraph 4 hereof within the period

stipulated, leave is granted to the fifth respondent to apply to me in writing, in chambers, on five days' notice to the first applicant, for the dismissal of the first applicant's application with costs on the same basis as provided in terms of paragraph 3 hereof.

A.G. BINNS-WARD
Judge of the High Court