

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED: NO |

Date: **30 June 2025** Signature: _____

CASE NO: 2025-047232

POTPALE INVESTMENTS (RF) PTY) LTD

Applicant

and

LETEANE, LETLHOGONOLO JOHN

Respondent

CASE NO: 2025-048371

POTPALE INVESTMENTS (RF) PTY) LTD

Applicant

and

SISIMOGANG, NONNY PATRICIA

Respondent

CASE NO: 2025-048374

POTPALE INVESTMENTS (RF) PTY) LTD

Applicant

and

HANYANE, MAGEZI JOHN

Respondent

CASE NO: 2025-048376

POTPALE INVESTMENTS (RF) PTY) LTD

Applicant

and

SIBIYA, BUSAGANI JAPHTA

Respondent

CASE NO: 2025-048382

POTPALE INVESTMENTS (RF) PTY) LTD

Applicant

and

LESHABANE, MICHAEL

Respondent

CASE NO: 2025-050634

POTPALE INVESTMENTS (RF) PTY) LTD

Applicant

and

MAHUMANI, JULIAS EZEKIEL

Respondent

Coram: **Strobl AJ**

Date of hearing: **18 & 20 June 2025**

Delivered: 30 June 2025 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 16:00 on 30 June 2025

JUDGMENT

STROBL AJ

[1] The above matters came before me in the unopposed court. All six concerned instalment sale credit agreements in terms of which the applicant (the same in all six matters) sold a minibus to the respondent (different in all six matters). In each matter the applicant issued a summons instituting action in which it alleged a default by the respondent and claimed cancellation of the credit agreement and return of the minibus. Together with each action, pending its finalisation, the applicant brought an *ex parte* application for interim relief asking for attachment and handing over of the minibus. It is these applications for interim relief that came before me.

[2] It was accepted in all the matters that the National Credit Act 34 of 2005 applied and the applicant was required to deliver a notice in terms of section 129(1)(a) before commencing with either the action or the applications for interim relief.

- [3] Conceivably two issues stood in the applicant's way: Firstly, section 129(5)(b) of the Act prescribes that insofar as a credit provider seeks to deliver a 129 notice at the location designated by the consumer, it must do so by handing it to an adult. This the applicant did not do because the sheriff could not find an adult and affixed it at the location instead. Secondly, and this issue was not immediately apparent to me at the hearing of the matters, each of the respondents had selected registered mail as their preferred method of delivery, which the applicant did not employ.
- [4] I invited counsel to deliver heads of argument on the issue and reserved judgment. Mr Botha, who appeared in some of the matters accepted the invitation and delivered heads of argument for which I am grateful. He furthermore brought to my attention the matter of Bridge Taxi Finance No. 5 (Pty) Ltd v Mongala (9372022) [2022] ZANCHC 69 (4 November 2022), in which he himself appeared, and in which the court found that the sheriff serving a 129 notice by affixing it at the consumer's chosen *domicilium* was insufficient to constitute delivery under section 129(5)(a) or (b). I am unaware of the exact facts that applied in that matter. Insofar as they are analogous, I disagree with the reasoning and conclusion for the reasons that follow.
- [5] As to the first issue, section 129(5)(a) and (b) of the Act prescribes that a 129 notice must be delivered to the consumer "*by registered mail*" or "*to an adult person at the location designated by the consumer*".

- [6] No other method of delivery is provided for.
- [7] Looking elsewhere in the NCA does not help. In my view, a credit provider cannot rely upon the delivery methods described in section 65 of the Act because section 65, specifically section 65(2), says that it can only be used if no method of delivery is prescribed for a particular document and section 129(5) specifically prescribes the permitted methods of delivery of a 129 notice. Section 168 has a similar qualification and may only be used if not “*otherwise provided in this Act*”.
- [8] I turn then to what I believe the NCA seeks to achieve by prescribing the methods of delivery set out in section 129(5)(a) and (b) and how it relates back to the all-important 129 notice.
- [9] A 129 notice comes into play when a credit provider is considering furthering and/or enforcing its rights under a credit agreement by such things as cancelling the credit agreement and litigating against the consumer. It is of paramount importance then that a consumer knows about the debt relief options at his or her disposal and has the opportunity of pursuing them.
- [10] Due to the seriousness of what is at stake, to me it appears that the NCA wants the credit provider to go the extra mile and attempt to physically handed over the 129 notice, either by physical collection at the post office, if it is served by registered mail in terms of section 129(5)(a), or by handing it over to an adult at a location designated by the consumer in terms of section 129(5)(b).

Common place and useful as emails, SMSs, WhatsApps may be these days, the NCA does not permit delivery in that way.

[11] Not only is the credit provider obligated to pursue a physical handover of the 129 notice, the NCA also requires a credit provider to prove it. Accountability in relation to the delivery is required under section 129(7)(a) of the Act, which requires proof from the postal service if a 129 notice is delivered by registered mail; and section 129(7)(b), which requires the signature or mark of the recipient when a credit provider delivers at the location designated by the consumer.

[12] But what happens when, as happened in the matters before me, the credit provider elects to deliver at the location designated by the consumer and its messenger (the sheriff) finds no one there to take delivery and/or cannot locate a person who is prepared to take delivery? In my view, a credit provider who then leaves the 129 notice in a prominent place at such location will have delivered the notice in terms of section 129(5)(b). I say so for the reasons that follow.

[13] The NCA strives to promote a competitive, sustainable, efficient and effective credit industry, see generally Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC) at paras [18] to [48], 64C – 74G. It imposes itself onto credit agreements whilst at the same time respecting the contracting parties' agreed rights and obligations, so long as they do not run contrary to what the NCA provides for.

- [14] When it comes to the delivery of a 129 notice by registered mail, the Constitutional Court has said that bringing the notice to the subjective attention of the consumer is not required and delivery is instead defined as the taking of certain steps prescribed by the NCA to apprise the reasonable consumer of the notice, Kubyana at para [39], 71G – H and Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC) at para [74], 166B and para [75], 166D – E.
- [15] I see no reason why the same principles should not apply when a credit provider delivers by messenger at the location designated by the consumer under section 129(5)(b).
- [16] In the spirit of the NCA, a reasonable consumer would take seriously the choice of location for the delivery of formal documents. It is the communication channel through which he or she chooses to be addressed and notified. It is a two way street. After choosing the location, not only is the consumer entitled to *receive* notice there, a credit provider should likewise be entitled to *give* or deliver notice there. It would be unfair for the law to insist on delivery at a specific location whilst simultaneously making it unachievable for a credit provider to do so.
- [17] If delivery cannot be achieved exactly as prescribed under section 129(5)(b) because the premises at the location are locked, there is no one there, or whoever is there is not prepared to accept delivery, this is not the fault of the credit provider. There are no steps a credit provider can take to counteract it. Borrowing from the law of contract, the credit provider has tendered proper

performance and is ready to perform. It has gone the extra mile to ensure physical delivery and taken what steps it can to ensure that the 129 notice is placed into someone's hand. The only reason it cannot do so is out of its control.

[18] One could argue that, as an additional step, a credit provider could always come back again another time. But such an obligation would potentially be never-ending. In my view, balancing the respective rights and obligations between credit provider and consumer, that would go too far. How often would a credit provider have to return before it is enough? As a matter of fairness, where a credit provider's rights and obligations are conditional or suspended, it should be able to remove the condition or suspension with certainty. If it needs to take steps before cancelling or before its claim prescribes, it needs to know what it must do and by when. It is unfair for the credit provider's rights to hinge on an unknown variable such as whether or not an adult will be at the location. Furthermore, there is nothing to say that even with multiple attempts the credit provider will eventually find an adult willing to take delivery.

[19] In my view, one attempt at the location designated by the consumer is enough and if there is no one to receive the notice the credit provider should strive for the next best thing which is to leave the notice at the location in a prominent place. This could entail the messenger sliding the 129 notice under the door or fixing it to any prominent place so that if and when a person returns to the location, it will be there for them to see. Slid under the door, it would take a lot for the 129 notice not to reach the person at the location. The risks associated with delivering a notification by registered mail are no less. I would think that a

messenger for the post office delivering a notification to an address where there is no one to receive it would likewise slip the notification under the door. If sliding under the door is not possible, and instead affixing the 129 notice at a prominent place, there is a risk that a third party might remove it before the consumer or adult in charge of the location returns, but I would think the risk is small. A 129 notice does not come in a box that might be perceived to have value; a passer-by seeing it would not, in these times I think, presume it to have a value. It is far more likely that when the consumer or adult in charge at the location returns, the 129 notice affixed to a prominent place would have remained there and would come to their attention. Again, I do not see the risk being any less in the case where a notification is delivered by registered mail and affixed in the same way.

- [20] Based on the aforesaid considerations, in my view, where a consumer has selected a location at which he or she will accept formal communications concerning the credit agreement and where the credit provider has taken the following steps to reach the consumer, they will constitute delivery of the 129 notice under section 129(5)(b): where the credit provider dispatches a messenger with a 129 notice to the location during working hours, Monday to Friday, with the intention of handing it to the consumer personally, or to an adult at the location who will sign for it; where the credit provider's messenger is unable to find a person that will take delivery and/or sign for it; where the credit provider's messenger then leaves the 129 notice at a prominent place at the location; and where a credit provider is able to prove all of the above to the court on a balance of probabilities.

- [21] In the matters before me the applicant was able to prove that the above steps were taken and in my view the manner in which it delivered the 129 notices to the respondents constituted proper delivery as contemplated in section 129(5)(b).
- [22] I turn to the second issue, which is the applicant delivering the 129 notices using a method different to the one selected by the respondents.
- [23] In each of the credit agreements before me the respondents stipulated a business/residential address and, below it, a postal address. In each instance the physical address and postal address were the same. All the respondents selected registered mail as the preferred method of delivery by which all notices were to be addressed to them (clause 21.2). Contrary thereto, the applicant adopted a different method, namely service by messenger at the location designated by the respondents.
- [24] A consumer's choice as to the method of delivery of formal communications and notices must obviously be respected however, whether delivery of a 129 notice has been effected must, in each case, be determined on the evidence, Kubyana at para [40], 72D. Jafta J went on to say in Kubaya at para [81], 82A that in delivering a 129 notice the credit provider may follow any method of delivery and whatever is done must constitute adequate proof that the notice has reached the consumer. In my view, a consumer's choice of method of delivery – and a credit provider's departure from it – must be given due weight

in determining whether or not adequate proof has been provided. That said, the court must still ultimately be satisfied, on a balance of probabilities, that the notice reached the consumer (Kubyana at para [82], 82C – D).

[25] Had the applicant attempted service of the 129 notices by registered mail and obtained proof that notifications were sent out by the collecting branches of the post office, I would have accepted that the applicant had discharged its obligations to deliver them, despite having no facts in relation to who purportedly delivered the notifications, that they were in fact delivered and, if so, how, when, where and to whom (if anybody) the notifications were purportedly delivered.

[26] By the applicant delivering in the way it did, with the benefit of the sheriff's returns of service in each matter, I have *prima facie* proof of who delivered the 129 notice (the sheriff); where it was delivered; the date it was delivered; the time it was delivered; the steps the sheriff took to try and locate the respondent personally; why, in each instance, the sheriff could not do so; who the sheriff dealt with (where he was able to deal with a person) and where the sheriff placed the notice in his attempt to bring it to the attention of an adult in charge of the location.

[27] To me, the manner in which the applicant served the section 129 notices gives me greater assurance and proof that the 129 notices reached the respondents than if they had they been sent by registered mail.

[28] My finding would perhaps be different if the physical address and the postal address given by each of the respondents was different. Then I would struggle to say that delivery at one location was as good as or better than another. But here the postal and physical addresses/locations for delivery were the same and whatever method the applicant adopted (registered mail or physical delivery at the location), at some point a person had to attend at the address/location and attempt to hand over a document, be it the 129 notice itself or a notification that a registered item was available for collection.

[29] Again, a consumer's selection of a delivery method must be respected but where, as in these matters, the selection has made no practical difference, a court should take this into account.

[30] As such, I do not think that the applicant's departure from the selected method of delivery has lessened the chances of the 129 notices reaching the respondents. The method of delivery employed by the applicant, in my view, was better, met all the objectives of the NCA and, on a balance of probabilities, reached the respondents.

[31] As a further consideration, were I to find that the applicant's delivery of the 129 notices did not comply with the NCA because it did not match the delivery method selected by the respondents, I would have to postpone each of the matters and make an order under section 130(4)(b) as to what steps the applicant should take to bring the notice to the respondents' attention,

presumably notification by registered mail. Doing so would, practically, send all the matters full circle for no reason.

[32] In the circumstances, and on the facts before me, I find that the steps taken by the applicant to deliver the 129 notices to the respondents constitute proper delivery under section 129(5)(b) and, notwithstanding that the applicant served the 129 notices using a method different to the one chosen by the respondents, I nevertheless find that the delivery was proper and the applicant has proved that the notices reached the respondents. Accordingly I make an order in terms of the draft orders in each of the applications before me.

STROBL AJ

*Acting Judge of the High Court
Gauteng Division, Johannesburg*

APPEARANCE

For the Applicant: JG Botha (matters 048371/2025 and 048374/2025) and T Steyn (matters 047232/2025; 048382/2025 and 050634/2025)

Instructed by: ODBB Inc

For the Respondents: N/A

Instructed by: N/A

