THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 20734/14

In the matter between:

JOHN BLACK EDWARDS **APPELLANT**

and

FIRSTRAND BANK LIMITED
T/A WESBANK **RESPONDENT**

Neutral citation: *Edwards v FirstRand Bank Limited t/a Wesbank* (20734/14) [2016] ZASCA 144 (30 September 2016)

Coram: Cachalia, Shongwe, Tshiqi and Seriti JJA and Makgoka AJA

Heard: **1 September 2016**

Delivered: **30 September 2016**

Summary: Credit agreement – National Credit Act 34 of 2005 – whether or not the credit provider complied with s 127(2) and (5) of the Act – court must satisfy itself that the credit provider has placed before it facts which show that the notice, on a balance of probabilities, has been sent to the consumer.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Monama J) sitting as court of first instance.

1 The appeal is dismissed with costs.

2 The order of the court a quo in para 25.2 specifying 1 August 2012 is replaced with the following:

'13 December 2012'

JUDGMENT

Shongwe JA (Tshiqi, Seriti JJA and Makgoka AJA concurring)

[1] It is well-known that the draughtsmanship of the National Credit Act 34 of 2005 (the NCA or the Act) is far from being a model of elegance. This appeal mainly concerns the interpretation and applicability of s 127 (2) and (5) of the Act. The Gauteng Local Division, Johannesburg (Monama J) ordered the appellant (consumer) to pay the respondent (credit provider) a sum of R668 461.69 plus interest and costs, being damages suffered by the respondent. The appeal is with the leave of the court a quo.

[2] The factual background is briefly that on 24 July 2009, the appellant and the respondent concluded an instalment sale agreement as defined in terms of s 8 (4)*(c)* of the NCA. The appellant purchased a motor vehicle, namely an Aston Martin Vantage Coupe for a contract price of R1 457 958.00. The appellant paid a deposit of R145 000.00 and was due to pay fifty nine monthly instalments of R23 100.00. During April 2011, the appellant fell into arrears, as a result the respondent issued summons against the appellant cancelling the agreement and

claimed the return of the vehicle, plus the shortfall as it was entitled to in terms of the credit agreement.

[3] The appellant entered an appearance to defend. The respondent immediately filed an application for summary judgment which the appellant unsuccessfully resisted. The court (Farber AJ) granted summary judgment on 12 August 2011 and ordered the appellant to return the vehicle to the respondent.

[4] In his plea the appellant raised a multiple number of defences, including, that the granting of the credit to him by the respondent was reckless because he was over indebted at the time the credit was granted. The appellant prayed that the credit agreement be declared a reckless agreement in terms of s 80 (1) read with s 81 (2), (3) and s 83(1) of the NCA. The appellant further denied that the respondent had complied with the provisions of sections 127 and 129 of the Act and denied that the vehicle was sold lawfully. He also averred that the respondent forced him to sign the agreement and that the agreement falls to be rectified by the reduction of the sum of R46 000, which deduction will result in him not being in arrears. The court, as indicated earlier, rejected all the defences raised and found that he had no bona fide defence. The court even remarked that it was strange that he sought 'to retain and use the vehicle despite his disavowal of the validity of the instrument which found his entitlement to retain and used it. A result of this kind, can simply not be countenanced'.

[5] It is significant to mention that the appellant unsuccessfully applied for leave to appeal against the summary judgment order. Even his application for leave to appeal to this Court suffered the same fate. The vehicle was eventually repossessed on 6 July 2012. A notice in terms of s 127(2) of the Act was dispatched by ordinary post to the appellant on 13 June 2012, using the address furnished in the credit agreement by the appellant as his domicilium citandi ex

executandi being 72 Turoco Road, Fourways 2055. In terms of clause 17(2) of the credit agreement, the appellant agreed that the physical address that he provided was the address he has selected as the address where legal notices must be sent.

[6] The respondent amended the summons accordingly in preparation of the second leg of the proceedings, being to recover the shortfall. The vehicle was sold at an auction. This is after the respondent had sent a notice in terms of s 127(5) of the Act. It is important to note that the respondent also attached to the amended summons the previous notices in terms of s 129(1) and s 127(2) of the Act. Ever since the vehicle was repossessed the appellant did absolutely nothing towards following up the attachment until the matter went on trial in March 2014 before Monama J.

[7] The court a quo indicated clearly that what was before it was the consideration of the quantum of damages, that is, the shortfall and the question whether there was compliance with the provisions of s 127 of the Act. Monama J also concluded that the only defence to be considered, was whether the respondent had complied with the provisions of s 127(2) and (5) of the Act.
His conclusion was:

'[18] The critical issue is whether the defendant was given notice of the valuation amount in the letter dated 13 June 2012 as required by section 127(2) as well as the information referred to in section 127(5) by virtue of the letter dated 1 August 2012.

[19] It is common cause in this matter that both the section[s] s 127(2) and 127(5) letters highlighted the information dictated by the respective sections. Both letters dealt with all the categories of information required to be disclosed. The letters were addressed to the defendant's chosen domicilium and were sent by ordinary mail.'

[8] Before this Court, the issues had been crystallised to whether or not the respondent complied with s 127(2) and (5) notices of the Act before disposing

of the vehicle. The appellant contended that he did not receive the s 127(2) and (5) notices of the Act. And also that the vehicle was not sold for the best price reasonably obtainable as contemplated in s 127(4)(*b*) of the Act. The appellant relied on *ABSA Bank Ltd v De Villiers & another* [2009] ZASCA 140; 2010 (2) All SA 99 (SCA); 2009 (5) SA 40 (C) in respect of the s 127 process. The procedure to be followed in respect of the s 127 process is clearly stated in the case quoted above, and I agree with it, but it does not assist the present appellant. In *ABSA* the initial application was brought in terms of s 130(1) of the Act for a final order authorising the attachment of the subject vehicle without cancelling the credit agreement first, which was found to be incorrect. It is, in my view, distinguishable from the facts of the case before us.

[9] On the other hand the respondent contended that, if the appellant did not receive the s 127(2) and (5) notices of the Act, it was a direct result of the appellant providing a physical address at which, knowingly, there was no street delivery of the post. This contention was affirmed by the court a quo when it concluded that 'The conduct of the defendant (appellant) in designating an address in which no street delivery occurs, is unreasonable'. The Constitutional Court in *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC) para 46 observed that:

'The Act does not imply, and cannot be interpreted to mean, that a consumer may unreasonably ignore the consequences of her election to receive notices by registered mail, when the notifications in question have been sent to the address which she duly nominated. While it is so that consumers should receive the full benefit of the protections afforded by the Act, the noble pursuits of that statute should not be open to abuse by individuals who seek to exercise those protections unreasonably or in bad faith.'

[10] Section 127(2) of the Act reads as follows:

'(2) Within 10 business days after the later of-

(a) receiving a notice in terms of subsection (1) *(b)* (i); or

(b) receiving goods tendered in terms of subsection (1) *(b)* (ii),

a credit provider must *give* the consumer written notice setting out the estimated value of the goods and any other prescribed information.' (My emphasis.)

Section 127(1) is not applicable in this case because, the appellant did not voluntarily terminate the agreement, but the respondent secured, by the court process, the termination of the agreement, and subsequently the attachment and sale of the vehicle in question. Therefore, the appellant is wrong when submitting that s 127 of the Act expressly provides that the appellant must actually receive the s 127(2) and (5) notices. The argument went further to say that the respondent must prove delivery of the notice and receipt thereof in order to comply with s 127 of the Act. The Constitutional Court in *Baliso v Firstrand Bank Limited t/a Wesbank* [2016] ZACC 23 Froneman J, writing for the majority judgment referred with approval to what Jafta J said in *Kubyana* at para 98:

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

In *Sebola & another v Standard Bank of SA Ltd & another* [2012] ZACC 11; 2012 (5) SA 142 (CC) s 129 of the Act was an issue and not s 127 of the Act.

[11] The majority in *Baliso* above concluded *obiter* in my view, that there is much force in the argument that it was illogical to make a distinction between the manner of giving notice under s 127(2) of the Act, and that required under s 129(1) of the Act. Although Froneman J, writing for the majority, was of the view that there is merit in the submission that there exists no good reason to differentiate materially between the method of complying with the s 127(2) notice requirement and that under s 129(1). He went on without deciding

whether the distinction between s 129(1) and 127(2) was justified or not. In para 30 of *Baliso*, he remarked that:

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

My understanding is that the distinction was not relevant to the facts of that case. That is why it was not definitively decided. On the other hand Zondo J, writing for the minority judgment, was of the view that:

'[30] The question raised by this matter is whether or not the sending of a section 127(2) notice by a credit provider to a consumer by ordinary mail constitutes compliance with section 127(2).'

Failure to comply with s 127(2) by the credit provider is detrimental even to the credit provider because the recovery of damages by way of the shortfall cannot be pursued. Therefore the importance of complying with s 127(2) is beneficial to both the consumer and the credit provider. It is settled law that the ordinary grammatical meaning of the words used in s 127(2) of the Act must be interpreted to mean just that. A registered mail is not what the legislature had in mind when it used the words 'give the consumer written notice.' It may be advisable to send the notice in terms of s 127(2) by registered mail but that is not what the law requires.

[12] Counsel for the respondent was at pains to explain why s 128(1) of the Act was not invoked by the appellant, as it was open to him to do so. He conceded that no evidence indicates why this section was not invoked. It is significant to note that the appellant did not quarrel with the evidence provided by the respondent during the trial. This concession also takes care of the evidence of quantum save for the storage costs which were cured by the amendment, effected by the respondent towards the close of its case during the trial.

[13] I now turn to deal with the provisions of s 127(5) of the Act in particular. It provides that:

'After selling any goods in terms of this section, a credit provider must-

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

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

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

(ii) the gross amount realised on the sale;

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

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

From the evidence adduced during the trial, it is clear that the respondent did send a notice in terms of s 127(5) of the Act to the address furnished by the appellant. The appellant does not dispute that the notice was sent, but denies that he received it. We know why he did not receive it, his failure to receive it must be squarely placed on the appellant's shoulder. Counsel for the appellant conceded that in terms of s 129(4) of the Act a consumer may not re-instate a credit agreement after the sale of the vehicle pursuant to an attachment. As in this case s 127(3) of the Act is not applicable because the appellant was clearly in default.

[14] I turn to deal with the deliberations during the hearing of this matter. A question was raised *mero motu* by this Court whether s 127 of the Act applies at all in the circumstances of this matter. In other words where the merx forming the subject of a credit agreement is repossessed by order of the court. The question presupposes that after the attachment of the merx and the subsequent sale thereof, the provisions of s 127(2) to (9) of the Act are not applicable. The matter changes from being governed by s 127(2) to (9) of the Act and

transforms to become a common law guided damages claim, so the proposition went

[15] Counsel for the appellant contended that the provisions of s 127(2) to (9) are always applicable whether there was a voluntary surrender of the goods or a forced repossession. He went further to suggest that the answer lies in s 131 which reads thus:

'Repossession of goods

If a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127 (2) to (9) and section 128, read with the changes required by the context, apply with respect to any goods attached in terms of that order'.

Although this question has not yet come before this Court for adjudication, Fourie J in *ABSA* (see para 8 above) seems to agree that s 127(2) to (9) is applicable even after a forced repossession of the merx. In para 29 of *ABSA* he deals with the interpretation of s 131 of the Act, although in a different set of facts from this case. He observed that s 131 imposes restrictions being that s 127(2) to (9) should be 'read with the changes required by the context'. He goes further to set out in detail the procedure to be followed regarding the execution and realisation of goods attached by virtue of a court order in terms of s 131 of the Act. Counsel for the respondent on the other hand seemed to agree that s 127 of the Act is not applicable at all after an attachment and sale of the goods. He suggested further that s 127(2) read with ss (3) of the Act fortifies his belief that s 127 of the Act does not apply where an attachment and sale have taken place. He acknowledged that if one is in default one cannot re-instate the credit agreement, alternatively that re-instatement would be impermissible.

[16] Whilst generally I am inclined to agree with the proposition that s 127(2) to (9) of the Act is applicable, I, however, consider that it is not applicable in the present case because the agreement had already been cancelled. Section 131

of the Act squarely answers the question whether s 127(2) is applicable at all in the positive. The purposes of the NCA are set out in s 3 of the Act and *inter alia*, to promote and advance the socio-economic welfare of South Africans, to protect the consumer's rights most of all to harmonise the system of debt enforcement.

[17] Considering the above discussions and reasons, I am satisfied that the respondent succeeded to show that the notices in terms of s 127(2) and (5) of the Act were duly given and/or sent to the appellant. The appellant has himself to blame by providing an address, which he knew, that no street deliveries could take place in the area. The appellant is a quantity surveyor. He is not the ordinary man in the street. He knew and/or should have known what service of legal notices meant.

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

1 The appeal is dismissed with costs.

2 The order of the court a quo in para 25.2 specifying 1 August 2012 is replaced with the following:

'13 December 2012'

_____

J B Z Shongwe
Judge of Appeal

Cachalia JA (Tshiqi JA concurring)

[19] I have read the judgment by Shongwe JA and agree with the order he proposes. But I think the disputed issues require fuller treatment. And I propose to do so.

[20] This appeal, with leave of the court a quo (Monama J), concerns a festering dispute between a recalcitrant debtor and a finance house regarding the enforcement of an instalment credit agreement concluded in 2009. The dispute goes back to November 2010 when the debtor first fell into arrears with his payments. The finance house is Firstrand Bank Limited t/a as Wesbank, which was the plaintiff in the court a quo. The debtor is Mr John Black Edwards, who is a quantity surveyor, and was the defendant.

[21] Mr Edwards bought a 2007 model of an Aston Martin Vantage Coupe sports car from Wesbank for the princely sum of approximately R2 million, which included interest charges amounting to R548 101. The cash price of the car was R1 457 958. The monthly instalment payment was about R23 088, payable over 59 months with a final instalment of R500 000.

[22] A car magazine describes driving this car as the best way to live out one's spy-fantasy. But Mr Edwards, it seems, is not a man with deep pockets, and soon found himself in difficulty meeting the monthly payments. On 11 June 2014, following a trial, the court a quo ordered him to pay Wesbank an amount of R668 461.69 plus interest, which he owed as at 1 August 2012. (The parties

agreed that in the event of Wesbank succeeding in the appeal, the correct date from which interest had to run was 13 December 2012.)

[23] In this court Mr Edwards abandoned his contention that Wesbank had not established the amount he owed. Instead he sought to take refuge in the procedural protections afforded to debtors by the National Credit Act 34 of 2005 (The Act). His complaint in this appeal is that Wesbank did not comply with ss 127(2) and 127(5) of the Act because it did not despatch the relevant notices to him by registered mail. As a consequence, he did not receive them, and Wesbank's failure in this regard, he contends, nullifies the order of the court a quo.

[24] Before I consider whether there is merit in the complaint some background is necessary. Mr Edwards first fell into arrears with his monthly payments in November 2010. A notice in terms of s 129 was sent to him by registered mail on 19 November in which Wesbank proposed, amongst other things, that Mr Edwards referred the agreement to a debt counsellor. He did not respond to the letter and was thus in default as envisaged in s 130(1) of the Act. Wesbank elected to cancel the agreement and on 11 April 2011 instituted debt enforcement proceedings against him in the South Gauteng High Court, Johannesburg (the high court). At that stage he was in arrears to the tune of R167 231 and the balance owing was R1 567 668. Mr Edwards entered an appearance to defend the matter on 16 May 2011. On 26 May 2011 Wesbank applied for summary judgment.

[25] Mr Edwards advanced several defences to resist the application: first, that he was improperly induced or compelled to enter into the agreement; second, that the agreement was unenforceable in as much as it was 'reckless' within the meaning of s 80; third, that the agreement fell to be set aside because he was 'over-indebted' as envisaged in s 86 and that he was not in arrears with his instalment payments. In a carefully considered judgment, the high court (Farber AJ) rejected each of these defences. On 12 August 2011, summary judgment was granted against Mr Edwards, and he was ordered to return the car. However, on the very same day he delivered an application for leave to appeal against the order.

[26] The application was heard on 3 February 2012. On this occasion Mr Edwards advanced two further grounds of appeal, which was that the agreement had not been lawfully cancelled, and that the s 129 notice was defective because it did not clearly indicate Wesbank's intention to cancel the agreement in the event of his not remedying the breach. He also contended that the summons was not properly served on him because it had been delivered to his attorney, and not to him personally. On 29 February 2012 the court gave judgment in which these further defences were also dismissed.

[27] Still not satisfied, Mr Edwards applied for leave to appeal to this court. His application suffered the same fate on 1 June 2012. On 6 June 2012 the car was restored to Wesbank in accordance with the summary judgment order of 12 August 2011. During this period of ten months Mr Edwards had the use of the car and took no steps to reduce his indebtedness to Wesbank.

[28] A week later, on 13 June 2012, Wesbank despatched a letter purportedly in terms of s 127(2), by ordinary mail to his address at 72 Turoco Road, Fourways. The letter said that the car had been valued at R500 000, excluding VAT. And, repeating the language of s 127(3) of the Act, that if he wished to reinstate the agreement and resume possession of the car he may do so on condition that he settled all arrear payments and further costs for which he was liable. Mr Edwards says that he did not receive this letter.

[29] On 26 July 2012 the car was sold at an auction conducted by a third party for R763 800, inclusive of VAT. The deficit at that stage was R780 499. On 1 August 2012, Wesbank sent another letter, in terms of s 127(5), also by ordinary mail, to Mr Edwards. This letter indicated that the settlement value, after expenses, was R780 449, which if not paid within ten days would result in further enforcement proceedings against him. This letter too, Mr Edwards says, he did not receive.

[30] On 13 December 2012, Wesbank filed a notice amending its particulars of claim to reflect the adjusted amount now owed. Importantly, it annexed both the ss 127(2) and 127(5) notices to it. On 26 February 2013, Mr Edwards delivered his plea and counterclaim. He once again pleaded his earlier defences relating to over-indebtedness and reckless credit, and also that s 129 had not been complied with. In addition he pleaded that, assuming s 127 applied, it was not complied with either. For present purposes it is not necessary to discuss the content of the counterclaim as it was not persisted with at the trial.

[31] The trial began on 14 March 2012. At the outset the court was asked to rule on whether or not Mr Edwards could persist with the defences pertaining to over-indebtedness, reckless credit and compliance with s 129 that had been dismissed in the summary judgment proceedings. The court held that these issues had been finally determined and could not be re-opened. In other words it upheld Wesbank's contention that these issues were res judicata. Mr Edwards does not appeal this ruling for good reason. What remained was the dispute pertaining to compliance with the s 127 notices, the extent of Mr Edward's indebtedness to Wesbank, and whether or not the car was sold at the best price reasonably obtainable in terms of s 127(4)*(b)*.

[32] During the trial Wesbank applied for and was granted an amendment to its summons to reflect a reduction in the amount Mr Edwards owed from R780 449 to R668 461. The trial lasted several days. In regard to the evidence regarding the delivery of the notices Wesbank adduced the evidence of three witnesses, who proved that the letters were sent to the address that Mr Edwards had given Wesbank for the delivery of legal notices in the agreement.

[33] Regarding the dispute over the amount that Mr Edwards owed, two witnesses were called: Mr Frank van Staden's evidence demonstrated conclusively how the final amounts has been calculated. Mr Roelof Johannes Strydom's evidence that the best price for the car was obtained at the public auction was compelling, stemming from his 21 years' experience in this area. Mr Edwards, through his legal representative, was not able to discredit their evidence despite having subjected them to lengthy cross-examination. Mr Edward's own evidence was less than satisfactory. He testified that he had not received the notices in terms of s 127 because there is no street delivery at

his home address and in his area. In regard to the price obtained for the car at the auction, he persisted with his claim that he could have received a better price had he been given the opportunity to do so. The learned judge found him to be a 'poor witness and highly arrogant,' and rejected his evidence.

[34] Although the appeal was directed at all the court a quo's findings, the issue pertaining to the amount that was owed as at 13 December 2012, ie R668 461, was abandoned in argument before us, as was his contention that Wesbank had not obtained the best price for the car at the auction. There was, in my view, no merit in either of these contentions.

[35] What remained is the dispute regarding compliance with the s 127 notices. Mr Edwards contends that Wesbank's failure to despatch these notices by registered mail means that they did not comply with the Act. Mr Edwards contends that he did not receive the notice in terms of s 127(2) before the car was sold. Neither did he receive the s 127(5) notice after the sale of the vehicle. Before I deal with whether or not there was sufficient proof that the notices were delivered to Mr Edwards it is necessary to consider whether, and to what extent, these provisions apply at all in the circumstances of this case, an issue the court debated fully with counsel for both parties during the hearing.

The relevant provisions

[36] I turn to consider the relevant provisions at the time of these proceedings.

'**127 Surrender of goods**

. . .

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

. . .

(b) receiving goods tendered in terms of subsection (1) *(b)* (ii),

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

(3) Within 10 business days after receiving a notice under subsection (2), the consumer may unconditionally withdraw the notice to terminate the agreement in terms of subsection (1)*(a)*, and resume possession of any goods that are in the credit provider's possession, unless the consumer is in default under the credit agreement.

(4) If the consumer-

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

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

(5) After selling any goods in terms of this section, a credit provider must-

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

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

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

(ii) the gross amount realised on the sale;

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

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

. . .

128 Compensation for consumer

(1) A consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of section 127 directly with the credit provider, or through alternative dispute resolution under Part A of Chapter 7, may apply to the Tribunal to review the sale.

(2) If the Tribunal considering an application in terms of this section is not satisfied that the credit provider sold the goods as soon as reasonably practicable, or for the best price

reasonably obtainable, the Tribunal may order the credit provider to credit and pay to the consumer an additional amount exceeding the net proceeds of sale.

(3) A decision by the Tribunal in terms of this section is subject to appeal to, or review by, the High Court to the extent permitted by section 148.

. . .

129 Required procedures before debt enforcement

. . .

(3) Subject to subsection (4), a consumer may-

(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and-

(b) after complying with paragraph *(a)*, may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.

(4) A credit provider may not re-instate or revive a credit agreement after-

(a) the sale of any property pursuant to-

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123.

. . .

131 Repossession of goods

If a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127 (2) to (9) and section 128, read with the changes required by the context, apply with respect to any goods attached in terms of that order.'

[37] Section 127 deals with a situation where the consumer wishes to terminate a credit agreement, gives notice to the credit provider thereof and surrenders the goods to the credit provider. Section 127(2)*(b)* then says that the credit provider must give the consumer written notice of the value of the goods so that the consumer may consider, under s127(3), whether or not to withdraw

the notice of intended termination and resume possession of the goods. But this does not apply if the consumer is in default under the agreement. If the consumer does not respond to the notice within the requisite time the credit provider must sell the goods for the best price reasonably obtainable as soon as possible.

[38] Once the credit provider has taken possession of the goods following the termination of the agreement, it may sell the goods. Section 127(5)*(a)* says that after selling the goods the credit provider must credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale and deduct its expenses in connection with the sale of the goods. Thereafter, the credit provider must, in terms of s 127(5)*(b)*, give written notice to the consumer of the relevant details regarding the determination of the settlement figure.

[39] Section 128 is also relevant. It says that where a consumer has unsuccessfully attempted to resolve a disputed sale of goods in terms of s 127 with the credit provider it may apply to the Tribunal to review the sale. A dispute relating to whether the goods were sold for the best price reasonably obtainable, as in this case, would probably be covered by this provision.

[40] These provisions deal with a situation where the consumer has surrendered goods to the credit provider voluntarily. Where, however, there has been an attachment of goods following upon a court order, as happened in this case, s 131 requires the application of s 127(2) to (9) and 128, but importantly they are to be read with the changes that the context requires.

[41] The first thing to be observed is that s 129(3), as it read at the time of these proceedings, permitted a consumer, *before* the credit provider has cancelled the agreement to reinstate it by paying the overdue amount and resume possession of the property. In its judgment refusing leave to appeal against the summary judgment ruling the court held that Wesbank had cancelled the agreement. This means that Mr Edwards was not entitled to reinstate the agreement and resume possession of the car, which is what the s 127(2) notice sent to him on 12 June 2012 invited him to consider doing. Mr Edwards was of course also in default under the agreement before the cancellation, which meant that he could not take repossession of the goods after having received the estimated value of the goods in terms of s 127(3) and s 127(4) either. Counsel for Mr Edwards was constrained to concede this during the hearing. Counsel for Wesbank argued that the section does not apply in these circumstances, precisely because Mr Edwards was not entitled to reinstate the agreement and resume possession of the goods.

[42] However, counsel for Mr Edwards maintained that s 127(2)*(b)* nevertheless applies in the present circumstances. He argued that before the attached car was sold, Mr Edwards should still have been given notice so that he had the opportunity to consider whether or not he wished to object to the estimated valuation of the car. The contention does not withstand scrutiny.

[43] Section 127(4) imposes an obligation on the credit provider to sell the goods at the best price reasonably obtainable if the consumer has not responded to the s 127(2) notice. The credit provider's estimated value of the goods plays no part in determining whether or not the best price was obtained, as is evident from this matter, where the estimated value of the car in the s 127(2) notice was

R500 000, but it was sold for considerably more, ie R763 800. The clear purpose of a s 127(2) notice, as I have mentioned, is to place the consumer in a position to consider whether to withdraw the termination notice and resume possession of the goods,[1] which is what the s 127(2) notice invited Mr Edwards to do. But this option was simply not available to Mr Edwards once the agreement had been cancelled and the court had ordered the attachment of the car. So, in this case, no purpose was served by sending the notice to him. Section 127(2) simply did not apply.

[44] However, even if Mr Edwards was entitled to receive the s 127(2) notice, his contention that he did not receive it has no merit. Once it was proved that the notice was sent to Mr Edwards, he had to explain why it was not reasonable to have expected the notice to reach his attention. This is because he bore the burden of rebutting the inference of delivery, and to show that his conduct was reasonable. If he did not receive the notice because of his own unreasonable conduct it would not matter whether or not he actually received delivery. He would not have rebutted the inference of delivery.[2] His insistence on the notice having to be sent by registered mail is to resort to form over substance. The question, surely, is whether or not he had actually received the notice or rebutted the inference that he had, not whether it was sent to him by registered mail.

[45] In clause 17 of the agreement between the parties, Mr Edwards 'agreed' that the *domicilium* address to which all 'legal notices' were to be sent was 72 Turoco Road, Fourways, which is the address to which the s 127(2) notice was sent. He also accepted that he would be 'deemed to have received a notice or

[1] *Baliso v Firstrand Bank Limited t/a Wesbank* [2016] ZACC 23 para 27.
[2] Ibid para 16.

letter five (5) business days after we have posted it to' him. This means that he accepted that he would be regarded or considered to have received the notice, whether or not he had in fact received it.

[46] Mr Edwards provided the street address to which he had elected to receive these notices. He denied having received the notice and proffered the explanation that there was no street delivery at his address. When confronted in cross-examination with the question why he had provided an address where he knew there was no street delivery he said that he did not read 'all the fine print'. Later on, he lamented the fact that he did not understand 'legal writing'. When asked why he did not ask the person assisting him to explain the terms of the agreement he said the documents were all prepared by the sales representative in an 'incredible hurry' and that he did not ask the person more than 'one or two things'. The court a quo was justified in describing him as a 'poor witness'.

[47] Human experience has shown that contracting parties often attempt to evade their contractual obligations by denying that they were aware or assented to the terms of an agreement. This is why our courts adopted the *caveat subscriptor* rule years ago. This entails that a person who claims not to have read or appreciated the terms to which he has bound himself cannot generally escape the consequences of not having read the document before signing it. In other words, he has assented to what appears in the document above his signature.

[48] Mr Edwards, who is 65 years of age, and hardly a man without experience or education, cannot escape the consequences of having selected an

address where he was aware that there was no street delivery. He bore the risk that the notice would not be delivered to his chosen address. His conduct in choosing this address for the mode of delivery despite his knowledge that he would not receive the mail was unreasonable. It matters not whether the notice was sent by ordinary or registered mail. He would still not have received it. He is thus 'deemed' to have received the s 127(2) notice.

[49] The dictum of the Constitutional Court in *Kubyana v Standard Bank of South Africa Ltd*[3] is apposite here, even though issue there was the delivery of a s 129 notice:

'The Act does not imply, and cannot be interpreted to mean, that a consumer may unreasonably ignore the consequences of her election to receive notices by registered mail, when the notifications in question have been sent to the address which she duly nominated. While it is so that consumers should enjoy the full benefit of the protections afforded by the Act, the noble pursuits of a statute should not be open to abuse by individuals who seek to exercise those protections unreasonably or in bad faith'

[50] I turn to consider the s 127(5) notice. Its purpose, when read with s 131, is to place the consumer, whose goods have been attached, in a position to dispute whether or not the credit provider has accounted properly in respect of the matters covered in s 127(5)*(b)*(i)-(iv). If there is a dispute regarding the sale, which presumably also covers the question whether the goods were sold for the best price reasonably obtainable in accordance with s 127(4)*(b)*, and the consumer has not been able to resolve it, he or she may use the procedure envisaged in s 128 by applying to the Tribunal to review the sale.

[3] *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC) para 46.

[51] In this case the s 127(5) notice was sent to Mr Edwards on 1 August 2012, a few days after the sale. He says he did not receive it. For the same reasons given in respect of the s 127(2) notice, this defence must fail.

[52] In this instance the defence is even less credible. Even if he did not receive the notice through the post, it was annexed to the amended particulars of claim on 13 December 2012, three months before the trial commenced, which he did receive. (The s 127(2) notice was also annexed to the amended particulars, but this was after the sale and is therefore immaterial.)

[53] It is important in this regard to emphasise what the Constitutional Court recently said the purpose of compliance with the notices such as s 127 is:

'Compliance is a prerequisite for "determining the matter". When is a matter "determined" in proceedings under the Act? That depends on whether the matter is opposed and default judgment is sought, or whether it is opposed and judgment is to follow upon hearing evidence at the trial.'[4]

[54] In the three months before the trial commenced Mr Edwards could have disputed the sale price and any other matter covered by s 127(5), and used the procedure available to him in s 128. If necessary he could have sought a postponement of the trial for this purpose. He did not do so, but elected to go to trial and contest the merits of the dispute, including the disputed sale price. After considering all the evidence, the high court ruled against him. This is not a case where the question regarding compliance with the s 127 notices is being

[4] *Baliso v Firstrand Bank Limited t/a Wesbank* [2016] ZACC 23 para 11.

raised in connection with default judgment proceedings, where different considerations apply to the procedural protections of consumers.

[55] Mr Edwards has, no doubt acting on proper legal advice, abandoned any challenge regarding the merits, ie the amount that he now owes and whether the best price was obtained. Before us all that remained was an attempt to use the alleged non-delivery of the notices as a procedural shield to avoid meeting his contractual obligations, as he had done when he raised a dispute regarding the s 129 notice and his other unmeritorious defences during the summary judgment proceedings.

[56] Even if there was substance in the complaint that he had not received the s 127(5) notice before the proceedings had commenced, its purpose was to place Mr Edwards in the position to contest, before the trial started, Wesbank's calculations regarding the amount that he owed and the price obtained through the sale of the car. These issues were fully canvassed at the trial. In fact, as I have mentioned, during the trial Wesbank amended its pleadings by reducing the amount owed from R780 449 to R668 461. Upholding his complaint that the notice was not properly delivered to him would only allow him to abuse the protection of the Act afforded to consumers and to escape his contractual obligations. It would truly be an abject case of placing form over substance. The courts cannot countenance such conduct, and this defence must, as I have held with the s 127(2) notice, also fail.

[57] To conclude, I would hold that Wesbank had no obligation to deliver a s 127(2) notice to Mr Edwards after the agreement had been cancelled and the

goods attached following the court order. And even if there was an obligation to do so Wesbank complied with the provisions of the Act by sending it to Mr Edward's chosen address, as it did with the s 127(5) notice. In addition the s 127(5) notice was also delivered to Mr Edward's attorney together with the amended pleading after the sale.

[58] For these reasons I agree with the order proposed by Shongwe JA.

A Cachalia

Judge of Appeal

Appearances

For the Appellant:	A A Bester Instructed by: Mathew Kerr-Phillips, Johannesburg; Claude Reid Incorporated, Bloemfontein.
For the Respondent:	F J Becker SC Instructed by: Smit, Jones & Pratt, Johannesburg; Symington & De Kok, Bloemfontein.