

## FINALLY - CLARIFICATION FOR LENDERS ON REQUIRED STEPS TO ACT AGAINST DEFAULTERS

*Recent case law has all but clarified what steps lenders must follow in order to validly commence legal proceedings against defaulting borrowers. It is so that the National Credit Act 34 of 2005 ('the NCA') requires a lender to send a 'section 129 Notice' to a consumer before enforcement steps may be initiated, but must this letter actually reach the debtor? In other words, does the Act require the lender to ensure that the debtor received the notice personally? Or is it adequate compliance with the NCA's consumer protection aims, if the notice was sent to the debtor at the address indicated in the loan agreement per registered post? What if the debtor never collects the notice from the Post Office?*

### ***Kubyana v Standard Bank***

The Constitutional Court, in the judgment of *Kubyana v Standard Bank of South Africa* handed down on 20 February this year, finally resolved this burning point. The facts that gave rise to the dispute were as follows: In 2007 Mr Kubyana and Standard Bank entered into an instalment sale agreement for the purchase of a motor vehicle. Mr Kubyana failed to make regular payments and fell into arrears. In 2010 the bank sent the prescribed section 129 notice to Mr Kubyana, indicating that he was in arrears and that it intended to approach a court for debt enforcement. The notice was sent by registered post to the branch of the Post Office that Mr Kubyana had chosen in the loan agreement (delivery confirmed by track and trace reports from the Post Office). Although two notifications were sent to his home by the Post Office requesting that he collect his registered mail, he never did so. Five weeks later the notice was returned to Standard Bank, uncollected.

The problem that arose was the question of compliance with section 129 of the NCA. The Act prescribes the steps that a credit provider must take before it may enforce the credit agreement in a Court and prescribes prior delivery of a section 129 Notice. The wording of section 129 demands that the notice must inform a consumer that he is in default and must propose the options available to the consumer, i.e. that the consumer has the option of the agreement being referred to a debt counselor. This is considered a vital aspect of the NCA's aim to inform and assist credit consumers.

The Constitutional Court upheld the prior decision of the North Gauteng High Court and found in favour of Standard Bank. It reasoned that, under section 129 of the Act, a credit provider wishing to enforce a credit agreement must deliver a compliant notice to a consumer, setting out the consumer's default and drawing the consumer's attention to his or her rights. This is an essential component of the Act's efforts to achieve non-litigious resolution of disputes. In order to effect delivery, the credit provider must take the steps to

bring the notice to the attention of a reasonable consumer. When a consumer has elected to receive notices and legal process by way of post, a credit provider must prove (i) dispatch of the notice by way of registered mail; (ii) that the notice reached the correct branch of the Post Office; and (iii) that the notification from the Post Office requesting that the consumer collect the section 129 notice was sent to the chosen address. If a credit provider has taken these steps it will generally have discharged its obligations unless, in the circumstances, the section 129 notice would still not have come to the attention of a reasonable consumer. The Court noted that when a consumer had elected to receive notices by way of post, the credit provider's obligation to deliver consisted of respecting the consumer's choice, undertaking the additional expense of sending notices by way of registered mail and ensuring that any notice was sent to the correct branch of the Post Office for the consumer's collection. Despite having gone through a full trial process, Mr Kubyana failed to provide an explanation for why he did not respond to the notifications from the Post Office. There was therefore no evidence before the Court showing why it was reasonable for Mr Kubyana not to have taken receipt of the section 129 notice.

#### ***A step in the right direction***

The outcome and clarification afforded by the judgment in Kubyana serves as a welcome clarification of the steps a lender must follow before it can institute action against a defaulting debtor.

Of note too is the Court's pronouncements on the reciprocal responsibilities of both the lender and the borrower to reach the aims of the NCA by stating that "[t]he notion of a 'reasonable consumer' implies obligations for both credit providers and consumers." This statement is important as many players in the credit industry make the NCA out to be blatantly one-sided in favour of the consumer. The Constitutional Court's interpretation of the provisions of the Act clearly presupposes a balance in the competing rights of consumers and credit providers. It states: "One of the main aims of the Act is to enable previously marginalised people to enter the credit market and access much needed credit. Credit is an invaluable tool in our economy. It must, however, be used wisely, ethically and responsibly. Just as these obligations of ethical and responsible behaviour apply to providers of credit, so too to consumers."

For assistance, contact us on [info@stbb.co.za](mailto:info@stbb.co.za).

#### CONTACT US

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|----------------------------------|--------------------------------------|------------------------------------|
| ■ CAPE TOWN<br>Tel: 021 406 9100 | ■ SOMERSET MALL<br>Tel: 021 850 6400 | ■ ILLOVO<br>Tel: 011 219 6200      |
| ■ CLAREMONT<br>Tel: 021 673 4700 | ■ TABLE VIEW<br>Tel: 021 521 4000    | ■ CENTURION<br>Tel: 012 001 1546   |
| ■ FISH HOEK<br>Tel: 021 784 1580 | ■ TYGERVALLEY<br>Tel: 021 943 3800   | ■ BEDFORDVIEW<br>Tel: 011 453 0577 |