Section 129(1) of the National Credit Act 34 of 2005 and the need to modernise delivery of notices: A consideration of *Viljoen v FirstRand Bank Limited t/a WesBank* (unreported case no 16593/2022) – Gauteng Division, Pretoria, delivered on 13 June 2025

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1 Introduction

The implementation of the National Credit Act 34 of 2005 ('NCA') has been hailed as one of the most important legislative instruments since the enactment of the South African Constitution (1996) (A Boraine and S Renke 'Some practical and comparative aspects of the cancellation of instalment agreements in terms of the national Credit Act (part 1)' (2007) 40 *De Jure* 222). In comparison to previous credit legislation, namely the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980, the NCA has undoubtedly created greater consumer rights for South Africans and streamlined the debt enforcement process, making it fairer and more transparent. Section 129 of the NCA was one of the key provisions specifically enacted to enhance consumer protection (S Govender and M Kelly-Louw 'Delivery of the compulsory section 129(1) notice as required by the National Credit Act 2005' (2018) *PER/PELJ* 1-2). See also JM Otto and R-L Otto *The National Credit Act explained* (2015), JW Scholtz *et al Guide to the National Credit Act* (2008 *et seq*) last updated 2025, and M Kelly-Louw and PN Stoop *Consumer credit regulation in South Africa* (2012) for a general overview of the NCA).

The notice required to be sent in terms of section 129 serves not only to inform consumers of their default but also refers consumers to several remedies available under the NCA. Unfortunately, despite its noble goals, section 129 has been controversial from an interpretational perspective. Although section 129 may be considered one of the most significant sections of the NCA, this section is the most ambiguous from a legal point of view (see MM Fuchs 'The impact of the National Credit Act on the enforcement of a mortgage bond: *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC)' (2013) 16 *PER/PELJ* 377 and M Kreuser 'The

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application of section 85 of the National Credit Act in an application for summary judgment' (2012) *De Jure* 1).

Numerous court judgments and academic publications have criticised the drafting of section 129 (see M Kelly-Louw 'The overcomplicated interpretation of the word 'may' in sections 129 and 123 of the National Credit Act' (2015) 132 *South African Law Journal* 246, M Kelly-Louw 'The default notice as required by the National Credit Act' (2010) 22 *South African Mercantile Law Journal* 570, S Eiselen 'National Credit Act 34 of 2005: The confusion continues' (2012) 75 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 389, C Singh 'I "notice" you "noticing" me: A critical analysis of the section 129 notice of the National Credit Act, and recommendations for the implementation of a "specialised" foreclosure notice' (2021) 33 *South African Mercantile Law Journal* 56 and C Singh 'Bye-Bye Mr Postman: A consideration of the electronic delivery of notices in terms of the National Credit Act 34 of 2005' (2024) 27 *PER/PELJ* 1, S Govender and M Kelly-Louw 'Delivery of the compulsory section 129(1) notice as required by the National Credit Act 2005' (2018) *PER/PELJ* 1 and C Singh 'A critical analysis of the home mortgage foreclosure requirements and procedure in South Africa and proposals for legislative reform' (unpublished PhD thesis, UKZN 2018). See also *Nedbank v NCR* 2011 (3) SA 581 (SCA), *BMW v Donkin* 2009 (6) SA 63 (KZN), *FirstRand Bank v Seyffert* 2010 (6) SA 429, and *Collett v FirstRand Bank* 2011(4) SA 508 (SCA)).

While some of the issues in section 129 have been resolved by case law and legislative amendments, namely the National Credit Amendment Act 19 of 2014 ('NCAA'), one of its main challenges remains the medium in which the section 129 notice must be delivered to the consumer. This note accordingly analyses the delivery requirements of the section 129 notice, briefly discusses relevant historical case law and the recent case of *Viljoen v FirstRand Bank Limited t/a WesBank* (unreported case no 16593/2022, Gauteng Division, Pretoria, delivered on 13 June 2025) and provides recommendations as to how delivery of the section 129 notice can be modernised.

2 Section 129 of the National Credit Act

In its current form, section 129(1) reads as follows:

> (1) If the consumer is in default under a credit agreement, the credit provider –
> a may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
> 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),

Section 129 essentially provides that a credit provider may not commence any debt enforcement proceedings to enforce a credit agreement before first providing a section 129(1)(a) notice to the consumer. The section 129 notice has consequently been described as the gateway to litigation (JW Scholtz (ed) *Guide to the National Credit Act* (2008 et seq) 12) and its purpose is thus four-fold:

- Firstly, the notice serves to bring the default to the knowledge of the consumer.
- Secondly, the notice alerts the consumer to the relief or mechanisms available, namely, the options to consult a debt counsellor, refer the matter to alternative dispute resolution or to the Ombudsman;
- Thirdly, the notice serves the function of a letter of demand and a precursor to litigation and enforcement of the debt; and
- Finally, the sending of the notice ensures adherence to the *audi alteram partem* rule, as it makes the consumer aware of the action, gives him/her an opportunity to respond, and requires the sender to prove compliance with the rule (see *Amardien and Others v Registrar of Deeds and Others* 2019 (3) 341 (CC) par 56).

As indicated above, the flaws in section 129 of the NCA have been well documented in both judicial and academic commentary. Prior to section 129's amendment by the NCAA, section 129(1) simply provided that the credit provider may draw the notice to the attention of the consumer. Section 129 failed to define the mode or medium of delivery of the notice. In other words, it was unclear whether the notice had to be delivered by personal service, regular mail, registered mail, electronic-mail or other means.

In its initial form, section 129 did not indicate how this notice should be delivered to a consumer, nor did the Act provide any definition for the word 'deliver'. This omission resulted in much uncertainty. Since the section was silent regarding the medium of delivery, it was debatable whether delivery by electronic means, such as e-mail or fax, was acceptable (see Singh (2024) *PER/PELJ*). Due to the lack of guidance in section 129, other provisions of the NCA had to be consulted to determine the mode of delivery section 129 required (see sections 65, 96 and 168 of the NCA). While some sections of the NCA permitted various modes of delivery, such as post, fax and e-mail, other sections only permitted delivery by hand or post and did not allow for electronic delivery. The National Credit Regulator (NCR) has accordingly summarised the position regarding delivery in terms of the NCA as follows:

i Where a method of service has been prescribed by the NCA, that method must be followed.

ii Where a legal notice must be sent, the method of delivery is either service or delivery to that person, or by registered mail. The address to be used is the one on the agreement or the one most recently chosen by the recipient (section 96).

iii Where a method has not been prescribed by the NCA, and where the document to be delivered is not a legal notice, the document can be delivered by ordinary mail, by fax, by email, or by printable web page and as chosen by the consumer (see Guideline for the digital service and delivery of notice and documents under the National Credit Act 34 of 2005, 02/2022 August 2022, by the National Credit Regulator).

Being a legal notice, case law has favoured the position that delivery to the consumer by hand, or by registered post, should be the preferred method of delivery for the section 129 notice. The next section will consider how the courts have struggled with the interpretation of section 129.

3 Brief history of case law relating to the section 129 notice and delivery requirements

As indicated above, section 129 initially failed to prescribe the medium by which the notice must be delivered. The section also failed to indicate whether the consumer must physically receive the notice, or whether it was sufficient for the credit provider to merely deliver the notice. This uncertainty led to an array of conflicting case law (see *Munien v BMW* 2010 (1) SA 549 (KZD), *FirstRand Bank v Bernado and Another* (608/09) ECHC, *Rossouw and Another v FirstRand Bank* 2010 (6) SA 439 (SCA) and *Starita v Absa Bank Ltd and Another* 2010 (3) SA 443 (GSJ), where the respective courts held that there would be compliance with section 129 if the credit provider merely delivered the notice. However, the courts in *FirstRand Bank v Dhlamini* 2010 (4) SA 531 (GNP) and *Absa Bank Ltd v Prochaska* 2009 (2) SA 512 (D) found that section 129 required the notice to come to the attention of the consumer, and that it was insufficient for the credit provider to merely deliver the notice).

The conflict was finally resolved by the Constitutional Court in *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) where the court found that section 129 requires the notice to be delivered to the consumer by registered mail, with the credit provider being required to supply proof that the notice was delivered to the correct post office (para 74) (see also *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) and *Absa v Mkhize* 2012 5 SA 574 (KZD)).

After the *Sebola* judgment, on 13 March 2015, section 129 was amended by the NCAA. Three subsections were inserted into section 129 and provided as follows:

> (5) The notice contemplated in subsection (1)(a) must be delivered to the consumer –
> a by registered mail; or
> b to an adult person at the location designated by the consumer.

(6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).
(7) Proof of delivery contemplated in subsection (5) is satisfied by:
a written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
b the signature or identifying mark of the recipient contemplated in subsection (5)(b).

The subsections provide for two methods of delivery, namely, per registered mail, or delivery in person. The amendment also set out, in section 129(7), how a credit provider should go about proving that it complied with the delivery requirements.

Despite these developments in providing clarity on the medium of delivery for the section 129 notice, the amendment by the NCAA was arguably an opportunity lost as the legislature failed to consider the modern age of technology and adopt the use of technology for delivering the section 129 notice by electronic means. This would have been the ideal opportunity to bring the law into the current age of technology by allowing the delivery of the section 129 notice by e-mail. Delivery by e-mail is more reliable than delivery by registered post – electronic communication can be easily tracked and traced. Further, delivery by electronic mediums is a cheaper and quicker means of correspondence than postal services. It is therefore regrettable that this was not provided for in the NCAA Moreover, delivery by electronic means is allowed and promoted by the Electronic Transactions and Communications Act 25 of 2002 (see section 19(4). See also section 44(1) of the Superior Courts Act 59 of 1959 and Rule 4A of the Uniform Rules of Court, which allows notices to be transmitted by electronic medium).

However, while there may be great advantages to permitting the delivery of legal notices electronically, there are also several risks. For example, spam filtering, incorrect addresses, and network issues could prevent the successful delivery of emails. Moreover, authentication, security and confidentiality concerns could compromise the integrity of electronic mails (for more discussion on the delivery of notices via electronic mail, see C Singh 'Signed, sealed and delivered (electronically): Embracing the digital takeover: A brief consideration of electronic signing and delivery in South Africa' (2022) *SLR* 618). Accordingly, the adoption of technology into the law must only be done after due diligence and consideration of the risks and benefits.

Over the last decade, courts have taken a pragmatic view to the adoption of technology into the law, and there have been several cases where courts have allowed legal notices, including the section 129 notice, to be delivered via the use of technology (see *FirstRand Bank Limited v Ngcobo* (24661/09 2009 ZAGPPHC 112 (11/09/2009), *FirstRand Bank Limited v Allie* (WCC) (19/04/2021) case no 9410/2020, *FirstRand Bank Limited v Joubert* (GNP) (21/12/2020) case no 34079/2020 and *FirstRand Bank Limited v Manie* (GNP) (66436/2019). In *Ngcobo*, the court found that since the bulk of communication between the parties had been via email, the consumer was at liberty to expect that the section 129 notice would also be sent by email (paras 23-24). In *Manie*, the court found it acceptable for the notices to be delivered electronically, as the consumer had evaded service of the notices. In *CMC Woodworking Machinery v Odendaal Kitchens* 2012 (5) SA 604 (KZD), the court allowed the service of legal notices via Facebook. (See Singh (2024) *PER/PELJ* 12-15 for a detailed discussion of these cases).

Accordingly, the time may have come for the NCA to be amended to allow for the delivery of the section 129 notice via electronic means.

4 *Viljoen v FirstRand Bank*

This case involved a rescission application against the default judgment granted against Viljoen, resulting from a default in payments on a motor vehicle instalment agreement. Viljoen had entered into an instalment agreement with FirstRand Bank for the purchase of a motor vehicle (paras 1-2). The agreement provided that should Viljoen fall into payment default, FirstRand Bank would be entitled to claim all amounts due under the agreement, cancel the agreement, repossess the vehicle and sell it to recover any outstanding balances (para 9). It was further agreed that Viljoen's *domicilium* would be 6 Valley Road, Mnandi in Centurion, and that he would notify FirstRand Bank of any changes to his address or contact details (para 9).

Viljoen defaulted on his payments in terms of the agreement, and FirstRand Bank, after unsuccessfully endeavouring to enter into a payment arrangement with Viljoen, initiated debt enforcement proceedings against the consumer (para 10; at this stage the arrears on the agreement were R 76 029.37. The facts revealed that First Rand Bank had made several attempts to negotiate with Viljoen. They engaged with him telephonically, via email and even sent an agent to Viljoen's home, but the consumer refused to engage with the bank).

In June 2022, FirstRand Bank applied for and was granted the default judgment (para 19). The vehicle was later repossessed and sold at auction by FirstRand Bank (paras 21-24).

The main issue before the court in the rescission application was whether there had been proper delivery of the section 129 notice, as Viljoen claimed he never received any of the notices (paras 5-6).

FirstRand Bank confirmed, in its particulars of claim, that it had complied with section 129 by sending the notice via registered mail and by e-mail to the addresses chosen by Viljoen. The track and trace reports from the Post Office, however, revealed that the letter was still 'in transit' and there was no proper delivery of the notice, nor was there any evidence that the e-mail sent to Viljoen was delivered or received. It also came to light that the notice was sent to the incorrect Post Office, as it was sent to the Garsfontein Post Office, instead of the Centurion Post

Office (paras 13-15). It was therefore clear that the allegations made by FirstRand Bank regarding compliance with section were incorrect.

In terms of section 129, read with section 130, a credit provider cannot institute debt enforcement proceedings prior to providing a section 129 notice to the consumer. Section 130(4) of the Act further provides that if a credit provider has not complied with the relevant provisions of the Act, the court must adjourn the matter before it and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed. FirstRand Bank claimed that if there had been any non-compliance, the court should exercise section 130 and adjourn the proceedings.

It was trite that the law did not require that the section 129 notice must come to the consumer's knowledge, but it also did not permit the credit provider to simply dispatch it (para 41). The court referred to the prevailing *Sebola* and *Kubyana* judgments, where the Constitutional Court confirmed that the credit provider must at least establish that the notice was delivered by registered mail to the correct Post Office that would send the notification to the consumer (para 43).

The court also referred to *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt* 2016 (6) SA 102 (SCA), which held that:

> … compliance with section 129 must be contained in the summons and proved. Delivery of a section 129 notice forms part of the cause of action. It is an essential component of the plaintiff's cause of action …. Absent compliance therewith, there would be no cause of action (para 20)

In *Kgomo and Another v Standard Bank of South Africa and Others* 2016 (2) SA 184 (GP), Dodson AJ held that:

> … the failure to deliver a section 129(1) notice was not merely a dilatory defence and was a required procedure (para 55).

Clearly, the track and trace report from the Post Office did not indicate that the notice was sent to Viljoen, the notice was not even sent to the correct Post Office. Furthermore, it was disputed whether Viljoen received the notice via e-mail (para 47). Therefore, it was clear that the notice was not properly delivered in accordance with section 129 (para 51).

No legal proceedings could commence before delivery of the notice. Accordingly, there could be no request to adjourn proceedings in terms of section 130(4), because there were no validly instituted proceedings capable of being adjourned. The proceedings could not therefore be adjourned in terms of section 130(4), as they had commenced before delivery of the section 129 notice (para 52).

Accordingly, the court found that the entire debt enforcement proceedings and the sale of Viljoen's vehicle were not in compliance with the NCA, and the judgment granted against him was rescinded (paras

53-54). The incorrect allegations in the credit provider's particulars of claim, confirming compliance with section 129, warranted a punitive costs order (para 54).

5 Conclusion and recommendations

In summary, section 129 provides that a credit provider must deliver to the consumer a notice prior to initiating debt enforcement proceedings.

In *Viljoen,* it was clear that the notice sent via registered mail was not correctly delivered to or received by the consumer. Accordingly, the court found non-compliance with the section, and the ensuing debt enforcement proceedings had to be set aside.

It was, however, questionable whether Viljoen had received the e-mail notification of the section 129 notice. Unfortunately, the court did not consider this point further, nor did it make any comments on the electronic delivery of the section 129 notice. As noted above, there have been instances where the courts have allowed for the section 129 notice to be delivered by email. In *Viljoen,* the court failed to recognise technology as a medium of communication for the delivery of the section 129 notice and missed the opportunity to develop the law in line with the fourth industrial revolution (in the circumstances, the court should have referred the issue of whether the notice can be delivered electronically to the legislature and whether there was a need to amend the NCA accordingly. See *LexisNexis South Africa (Pty) Ltd v The Minister of Justice and Constitutional Development* 2026 3 SA 71 (SCA) where the court referred the Justices of the Peace and Commissioner of Oaths Act 16 of 1963 to the legislature to consider the issue of whether affidavits can be signed and commissioned electronically). If delivery of the notice via e-mail is allowed, then (provided FirstRand Bank was able to submit evidence that the e-mail was correctly delivered), the debt enforcement proceedings initiated by FirstRand Bank would have been in compliance with the NCA.

It was clear that Viljoen could not afford the repayments, and it was questionable whether his defence was *bona fide* (paras 10, 13 and 32). There have been many instances where *mala fide* consumers have evaded delivery of the notice to escape the consequences of their default and frustrated the credit providers' debt enforcement proceedings (see *Kubyana* and *Mkhize*). Permitting delivery of notices via electronic means could counter this challenge.

As indicated above, delivery by electronic mail is much faster, more cost effective and more reliable than delivery via registered mail by the Post Office. Further, given its various inefficiencies, it is debatable whether the Post Office can still be relied upon for the delivery of important notices (at the time of writing this note, the Post Office was under provisional liquidation). Unlike delivery by post/registered mail which could take several days or weeks, delivery by email is instantaneous. Further, if a notice is delivered electronically, an electronic audit trail can be provided evidencing the exact time and date the email was delivered, or whether there were any errors with the delivery – which can prompt the sender to correct the errors and enable the notice to be correctly sent. It is important to note that, since the Covid-19 pandemic, the use of technology in the law has been accelerated – for example, electronic signatures are being used to sign multimillion rand contracts and virtual conferencing has been used by courts to hear witness testimonies (see C Singh 'Signed, sealed and delivered (electronically): Embracing the digital takeover: A brief consideration of electronic signing and delivery in South Africa' (2022) *SLR* 618 and C Singh 'A sign of the times: A brief consideration of e-signatures in agreements and affidavits in South African law' (2024) *Obiter* 38 for a deeper discussion on the role of technology in the law).

However, it is also important to remember that despite the advantages of technology, there are also several risks of blindly adopting technology into the law. As indicated above, the electronic delivery of notices could potentially create risks for, inter alia: data security breaches, confidentiality violations, and widen the discrimination between persons who have and who do not have access to technology. Accordingly, the adoption of the electronic delivery of notices must only be implemented after a due diligent analysis of its risks and benefits. The delivery of notices via electronic means should only be utilised if both parties explicitly consent to its use; and agree on the specific reputable and recognised electronic delivery medium (service provider) to be used for such purposes (it is recommended that the legislature must prescribe a selected list of reputable and recognised service providers that should be used for the electronic delivery of section 129 notices, and provide guidelines as to how notices should be delivered using these technologies, in particular, what would constitute proper delivery of a section 129 notice via electronic means).

Overall, it is submitted that there is a need for the law to embrace the use of technology and it is consequently suggested that the NCA should be amended to allow for the section 129 notice to be delivered by electronic means. Accordingly, section 129 should be amended to that effect (proposed amendments underlined) ...

> (5) The notice contemplated in subsection (1)(a) must be delivered to the consumer –
> a by registered mail;
> b to an adult person at the location designated by the consumer; or
> <u>c</u> <u>by email or any other electronic delivery medium to the address chosen by the consumer</u>
>
> (6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).
>
> (7) Proof of delivery contemplated in subsection (5) is satisfied by –
> a written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or

b the signature or identifying mark of the recipient contemplated in subsection (5)(b).

c electronic proof of delivery or electronic receipt notification successfully delivered by the electronic delivery provider

Finally, in terms of section 130(4), in instances where there is non-compliance with section 129, the court must adjourn proceedings and provide steps on how the matter should proceed further. However, in *Viljoen*, the court held that it was unable to adjourn proceedings in terms of section 130 as the proceedings should not have been initiated and occurred prior to section 129 being complied with. In other words, it seems that the court found the entire process improper and was not able to adjourn such proceedings. It is submitted that this was the correct finding by the court as it once again confirms that compliance with section 129 forms part of the cause of action, and if there has been non-compliance the cause of action will fall away. This finding emphasises the importance of section 129 and confirms the principle that section 129 is the gateway to litigation and non-compliance therewith could deem any ensuing process irregular.