e-MANTSHI

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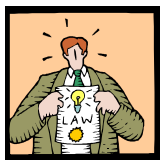
Welcome to the Fifty Fourth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search all the issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. The Rules Board for Courts of Law established under *Act 107/1985* has amended the Magistrates' Courts Rules of Court with effect from 13 August 2010. Part 2 of table C of Annexure 2 to the Rules have been amended. This refers to the tariffs Sheriffs who are not officers of the Public Service may claim. The amendment was published in Government Gazette no 33355 of 9 July 2010.
2. A *Magistrate's Courts Amendment Bill, 2010* has been published in Government Gazette no 33362 dated 6 July 2010.The Bill is intended to amend the *Magistrates' Courts Act, 1944*, so as to regulate anew the qualifications required for the appointment of a person as a magistrate, additional magistrate and magistrate of a regional division; to further regulate the inclusion of magistrates of regional divisions on the list of magistrates who may adjudicate on civil disputes; to authorise the Minister to determine the conditions relating to the authorisation of a person to serve process of court or other documents on behalf of a public body; and to provide for matters connected therewith.
3. A *Births And Deaths Registration Amendment Bill* has been published for introduction to Parliament in Government Gazette no 33356 of 5 July 2010.The purpose of the Bill is to amend the *Births and Deaths Registration Act, 1992*, so as to substitute, insert and delete certain definitions; to revise provisions relating to the registration of births; to revise provisions relating to amendments of birth registration; to provide for the designation of funeral undertakers; to make provision for the recording of adoptions; to revise the

provisions relating to secrecy of records obtained under this Act; to clarify provisions relating to the making of regulations; to repeal certain sections; and to provide for matters connected therewith.

4. A *Civilian Secretariat for Police Service Bill* has been published in Government Gazette no 33357 of 5 July 2010.The purpose of this Bill is :

   To provide for the establishment of a Civilian Secretariat for the Police Service in the Republic; to define the objects, functions and powers of the Secretariat, and for this purpose to align the operations of the Secretariat in the national and provincial spheres of government and reorganise the Secretariat into an effective and efficient organ of state; to regulate the appointment, duties and functions, powers and removal from office of the Secretary for the Police Service and heads of provincial secretariats; to provide for the establishment of a senior management forum and a Ministerial Executive Committee; to provide for co-operation between the Secretariat and the Independent Police Investigative Directorate; to provide for intervention into the affairs of provincial secretariats by the Secretariat; and to provide for matters connected therewith.

5. A *Independent Police Investigative Directorate Bill* has been published in Government Gazette no 33357 of 5 July 2010. The purpose of the Bill is :

   To make provision for the establishment of an Independent Police Investigative Directorate and to regulate the functions of the Directorate, to provide for the establishment of a Management Committee and Consultative Forum and their respective functions; to provide for the appointment and powers of investigators; to provide for transitional arrangements; to provide for the repeal and amendment of certain laws.

(All of the above bills can be accessed at www.pmg.org.za/bill)

Recent Court Cases

1. S v Chukwu 2010(2) SACR 29 GNP

Whether proceedings in which a candidate attorney appeared whose rights to appear had expired, should be vitiated depends on the accused's right to a fair trial.

The two accused stood trial in a magistrates' court on various charges under the Drugs and Drug Trafficking Act 140 of 1992. They were represented by a candidate attorney, M. During the course of the proceedings, M's entitlement to appear expired, but he continued to act for the accused. By the time it came to light that M

lacked the right to appear he had already been admitted as an advocate, and the principal on behalf of whom he had previously appeared wished to brief him to continue with the trial. It was, furthermore, common cause that the accused wished M to continue as their representative. The presiding officer deemed it necessary to refer the matter to the High Court on special review for a decision as to whether or not the irregularity involved was one which vitiated the proceedings.

Held, that a candidate attorney who continued to appear after the expiry of the certificate exhibiting his or her right to appear, committed an irregularity. However, not every irregularity vitiated the proceedings during which it had occurred. The question of vitiation—or of how the consequences of an irregularity should be dealt with—must be related to the accused's right to a fair trial. In this regard, various factors had to be considered. First, in the present matter proceedings had not yet been finalised; it was accordingly not possible to apply the established test for vitiation, namely whether a reasonable trial court would have convicted despite the irregularity. Second, the accused were eager to have M continue representing them. Third, all the evidence had been led and both sides had closed their cases. Fourth, M appeared to be an experienced and eloquent lawyer, and he had been systematic in leading evidence and cross-examining witnesses. Fifth, there would be serious repercussions of costs and inconvenience for both the accused and the State if the proceedings were set aside. Sixth, at the close of the State's case the accused had successfully applied for discharge on a significant number of the counts against them. Seventh, M had been admitted as an advocate and there was therefore no doubt regarding his capacity and ability to conduct a criminal trial. (Paragraphs [9] and [13] at 35h-i and 37e-39a.)

Held, accordingly, that against the background of these factors it could not be said that there would be a miscarriage of justice if the proceedings were allowed to remain intact and the case allowed to reach finality. Furthermore, M should be permitted to continue representing the accused. To order otherwise would, on the facts of the case, amount to a technical adherence to formalism at the expense of the accused's right to be treated fairly. (Paragraphs [14] and [15] at 39b-e.)

Trial ordered to resume before same magistrate and with same representative permitted to appear on behalf of accused.

2. S v De Klerk 2010(2) SACR 40 KZP

The introduction of correctional supervision as a sentencing option had resulted in a shift from retribution to rehabilitation.

The appellant, a 39-year-old first offender, had, on his plea of guilty, been convicted in a regional magistrates' court on three counts of indecent assault on young girls and sentenced to ten years' imprisonment on each count, an effective sentence of 30 years' imprisonment. During the sentencing proceedings in the regional court, the defence had called Dr R, a clinical psychologist with 22 years' experience,

specialising in child psychology and psychosocial matters with respect to criminal matters, divorce and sexual abuse. She testified that the appellant was a regressed offender, and not a fixated offender. Regressed offenders were at a lower risk of reoffending if treated, were not fixated on children and were capable of remorse for their actions, whereas fixated offenders had a high incidence of recidivism. The appellant was furthermore an opportunistic sexual offender and was not a predatory sexual offender. Dr R testified that the appellant understood that what he had done was wrong and that he felt remorse and a strong sense of guilt for his behaviour. This remorse was borne out by his guilty plea. Dr R testified further about recommended forms of treatment for the appellant and that incarceration might result in the appellant becoming more of a threat to society and would exacerbate some of the issues requiring therapeutic intervention. In sentencing the appellant the regional magistrate said that he had not been persuaded to consider a non-custodial sentence, such as correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977, when it was clear that he was of the view that a non-custodial sentence equated to a lenient sentence. He emphasised that only a sentence of incarceration would act as a deterrent, without considering other means of deterrence.

Held, that the regional magistrate had misdirected himself in certain respects in dealing with the evidence of Dr R and the court was therefore at large to set aside the sentence and impose an appropriate sentence. (Paragraph [12] at 44h—45c, paraphrased.)

Held, further, that the sentence was also so shockingly inappropriate as to warrant interference on appeal. There was, in the regional magistrate's reasons, a clear bias to the punitive and deterrent aspects of sentencing. (Paragraph [13] at 45c and 45d.)

Held, further, that the Constitutional Court had held that, whilst deterrence was previously considered the main purpose of punishment, with other objects being accessory, the introduction of correctional supervision as a sentencing option had resulted in a shift from retribution to rehabilitation. This still required an assessment of the traditional triad, the personal circumstances of the appellant, the nature of the crimes under review and the interests of society. It was geared to punish and rehabilitate the offender within the community, leaving his or her work and domestic routines intact, and without the negative influences of prison. (Paragraph [14] at 45e-f.)

Held, further, after a review of decided cases, that the evidence of Dr R showed that there was a prospect of rehabilitation. The appellant had shown remorse and had acted on his remorse and had taken steps to seek help. The appellant's imprisonment and any further period of imprisonment would increase the risk of recidivism and would not be in the interest of the community at large. The evidence of Dr R had been well researched and reasoned and the conclusions were correct and compelling. (Paragraph [28] at 50f-h.)

Held, further, in the circumstances, that the counts should be taken together for purposes of sentence and, in the light of the evidence, the appellant did not fall into

the category of offender who had to be removed from society. Whilst there was a risk of recidivism, it was a highly limited one which could be addressed within the ambit of correctional supervision. The court was therefore confident that correctional supervision was appropriate in this instance. (Paragraph [29] at 50i-51a.)

Held, further, however, that the correctional supervision should be coupled to a suspended period of imprisonment which would be put into effect if the appellant committed a similar offence during the period of suspension. The denunciatory aspect of sentencing, and that of deterrence, both for the appellant and for potential offenders, could be adequately catered for by this and stringent conditions for the period of correctional supervision with which the appellant would have to comply, on pain of incarceration. (Paragraph [29] at 51a-b.) Appeal upheld and sentence replaced with a sentence of three years' correctional supervision on appropriate conditions and a further sentence of five years' imprisonment wholly suspended for five years, on condition that the appellant was not convicted of the offence of rape or indecent assault committed during the period of suspension. (Paragraphs [30] and [31] at 51c-52e.)

3. S v Lachman 2010(2) SACR 52 SCA

If a suspect objected to a search, the police could merely secure the scene until a warrant had been obtained or it could invoke section 22(b)of Act 51 of 1977 and proceed with the search on grounds of a reasonable belief that a warrant would be granted.

The appellant was convicted of corruption, in that he had contravened s 1(1) (b) of the Corruption Act 94 of 1992, and was sentenced to five years' imprisonment, of which two were suspended. The charge arose from his attempt, while an employee of the South African Revenue Service, to solicit a bribe from a taxpayer, M, in return for making the latter's tax problems 'go away'. The appellant's main ground of appeal was that the police operation which led to his arrest had been a trap, and that the evidence relating thereto was inadmissible, as there had not been proper compliance with s 252A of the Criminal Procedure Act 51 of 1977 (the Act). He also contended that a cell phone, which had been used to send SMSs to M, had been unlawfully seized because the search which revealed it, had been conducted without a warrant and without satisfying the provisions of s 22 of the Act. He appealed unsuccessfully to the High Court before approaching the Supreme Court of Appeal.

Held, that it was quite clear that the proposal for criminal conduct had emanated from the appellant, and no one else. His overtures to M had persisted for more than three weeks, by means of over 200 SMSs. All that M had done, with the assistance of the police, was to create the opportunity for the appellant to consummate the corrupt transaction; he had not encouraged or solicited the crime. Under the circumstances, the police conduct had not amounted to a trap. However, even if it had, it had not gone beyond providing an opportunity for the appellant to commit the offence, in which event such evidence was ipso facto admissible in terms of s 252A(l) of the Act. Accordingly, the evidence surrounding the police operation and

what it had produced had correctly been admitted. (Paragraphs [31]-[33] at 62c-62b.)

Held, further, that the appellant had consented to the search of both his person and his desk. The court a quo had correctly rejected the argument that the consent was not reliable because, firstly, the appellant had not been advised that he could object to the search; and secondly, that any article seized could be used in evidence against him. It was obvious that anything incriminating that was found could be used against him. Furthermore, if he or his representative had objected to the search, the police would merely have secured the scene of the search until they had obtained a warrant; or they could have invoked s 22(b) of the Act and proceeded immediately with the search on the basis that they had reasonable grounds to believe that a warrant would be granted, and that the delay that would be occasioned by such an application would defeat the object of the search. Either way, the retrieval of the cell phone would have been the inevitable result. (Paragraphs [35]-[37] at 62f-63g.)

Held, further, that the appellant had been convicted on circumstantial evidence; such evidence should never be approached in a piecemeal fashion, but evaluated in its entirety. It was beyond doubt that the SMSs had all emanated from the same cell phone number, and the inference was irresistible that this number belonged to the brown cell phone discovered during the search of the appellant's desk. As to the question of who owned the cell phone, it had been found on the appellant's desk; two colleagues testified to having seen him using a brown cell phone on different occasions, including on the morning of his arrest; and it had not been suggested that they had 'planted' the cell phone on his desk or that they were conspiring to implicate him falsely. This evidence became even more compelling when weighed against the improbability of the appellant's total denial of any knowledge of the cell phone. The link between him and the cell phone had been clearly established, with the corollary that he had been the person who had sent the incriminating SMSs to M. Accordingly, the State had proved the appellant's guilt beyond reasonable doubt. (Paragraphs [40]—[44] at 64d-65d.). Appeal dismissed.

From The Legal Journals

Ndaba, T

"Rather improve than abandon 'best interests of the child' criterion"

De Rebus July 2010

Nel, J
"A brief summary of items recoverable by a credit provider from the consumer"

De Rebus July 2010

Monty, S

"Section 129 'to give or to receive'

De Rebus July 2010

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

Entrapment

There have been at least three recent noteworthy cases dealing with the entrapment by the state of the accused. They are *S v Kotze 2010 (1) SACR 100* (SCA);*S v Zurich 2010 (1) SACR 171 (SCA*); and *S v Nnasolu and another 2010 (1) SACR 561 (KZP*).

Section 252 A of the Criminal Procedure Act 51 of 1977 regulates the use of traps to obtain evidence incriminating a suspect. The section envisages two types of trap – a trap where the suspect is just given an opportunity to commit a crime; and a trap which goes beyond simply providing this opportunity. The former are regarded as fair traps, and evidence so obtained is admissible in terms of section 252 A of the Criminal Procedure Act 51 of 1977. Evidence obtained by a fair trap may still be excluded on constitutional grounds in terms of section 35(5) of the Constitution (see *S v Odugo 2001 (1) SACR 560 W* at 568-9).

Traps which go beyond simply providing an opportunity to commit the offence are regarded as potentially unfair – and the court 'may refuse to allow such evidence to be tendered …if the evidence was obtained in an improper or unfair manner and …the admission of the evidence would render the trial unfair or be otherwise detrimental to the interests of justice.' Whether this is the case must be determined with reference to a number of factors (see section 252 A (3) (a), Criminal Procedure Act supra). If a constitutional right has been violated, section 35(5) of the Constitution is applicable – and compels the court to exclude the evidence if to admit it would render the trial unfair or be otherwise detrimental to the interests of justice.

The poor drafting of section 252 A of the Criminal Procedure Act (supra) has been commented on in many cases (see, for example, *S v Makhanya and another 2002 (3) SA 201 (N*);*S v Reeding and another 2005 (2) SACR 631 (C);* and *S v Dube 2000 (1) SACR 53 (N)).*However the legislature has failed to respond to calls for it to be revised, and the courts have thus been constrained to apply existing law to the three cases under discussion.

In *S v Zurich 2010 (1) SACR 171 (SCA*), the appellant (an attorney) had been convicted in a regional magistrate's court of contravening legislation prohibiting the trafficking in elephant tusks. One of the grounds of his appeal was that the trap evidence should not have been admitted into court. During the undercover operation, the undercover trap's credibility was questioned – and this threatened to blow the entire covert operation. In order to bolster his credibility, the police staged the false arrest of the undercover trap. The court - magistrates and prosecutors- was not in on the secret. The undercover trap then sought legal assistance from the appellant who was thus ultimately led to trust him sufficiently to commit the offence involving the elephant tusks.

The appellant conceded that the trap did not go beyond providing an opportunity for the commission of the offence, but contended that section 35(5) of the Constitution of the Republic of South Africa Act required that the evidence be excluded. The court held that although the conduct of the police was improper, it was improper as against the court, the magistrates and the prosecutors involved. The appellant conceded that his constitutional rights had not been violated – and that the trap had simply misrepresented his true identity to him. The court accepted that misrepresentations are a normal and accepted part of the trapping process. Accordingly, the court held that the evidence had been correctly admitted, and thus dismissed the appeal.

In view of the lack of resources that our courts have for legitimate cases, and with reports of accused persons spending years awaiting trial, I am of the view that the court should have indicated its disgust with the waste of court time and resources with a bogus case, by excluding the trap evidence.

In the case of *S v Kotze 2010 (1) SACR 100 (SCA*) the appellant appealed against his conviction on a count of dealing in uncut diamonds. His appeal to the High Court failed, but he was granted leave to appeal to the Supreme Court of Appeal on conviction only.

Two important points come out of this case, both arising from section 252A (6) of the Criminal Procedure Act 51 of 1977. In the first place, the court stressed that section 252A (6) (supra) requires the accused to furnish the grounds on which the admissibility of the entrapment evidence is being challenged. The Supreme Court of Appeal suggested that better use of this section should be made by presiding officers to optimise efficiency in determining the admissibility of trap evidence.

However, the court rejected the requirement that the state's burden of proving the entrapment evidence admissible be discharged on a balance of probability. It held that this would be unconstitutional, being in conflict with the presumption of innocence and the right to silence. The judge held as follows:

> "Whilst the section refers to the burden being discharged on a balance of probabilities, it is in my prima facie view incompatible with the constitutional presumption of innocence and the constitutional protection of silence. These rights must be seen in the light of the jurisprudence of the constitutional court, in which it has been held that their effect is that the guilt of an accused person must be established beyond reasonable doubt. That a confession was made freely and voluntarily and without having been induced thereto must be proved beyond a reasonable doubt and I can see no practical difference between that case and a case where a conviction is based on the evidence of a trap. Each deals with the proof of facts necessary to prove the guilt of the accused. In my prima facie view therefore…in order for the evidence of a trap to be admitted, it is necessary that the trial court be satisfied that the basis of its admissibility has been established beyond a reasonable doubt…(*S v Kotze* (supra) at para 20)"

In the case of *S v Nnasolu and another 2010 (1) SACR 561 (KZP*), the appellant appealed against his conviction of dealing in cocaine. The facts revealed that he was identified as a dealer by an informant who provided the police with his first name, and his cell phone number. The police called the number, and arranged to make the purchase. The appellant was then arrested after the transaction had taken place. His conviction depended on the entrapment evidence. The appellant's defence was that he lacked the *mens rea* necessary for the conviction, because he had not known it was cocaine he was selling. He alleged he believed the package contained jewelry. The court endorsed the reasoning in the case of *S v Kotze* (supra) and held that even if it were to assume that the trap did go beyond the provision of an opportunity to commit the offence, the trap had not 'rendered any unfairness on the appellant' (at para 45,supra). The court thus held that the trap evidence was correctly admitted by the court a quo. In my view, the trap did not even go beyond providing an opportunity for him to commit an offence. In any event, the appellant's conviction was duly confirmed, but his sentence was reduced from 25 years imprisonment to 10 years.

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Matters of Interest to Magistrates

CONTRASTING CONFLICTING DECISIONS REGARDING THE PHRASE " ……. MAY DRAW THE DEFAULT TO THE NOTICE OF THE CONSUMER IN WRITING" ("the phrase") IN THE NATIONAL CREDIT ACT, 2005 (ACT 34 OF 2005,("the Act"))

INTRODUCTION

The Act finally came into operation on 1 June 2007 and has brought with it sweeping changes, to mention but a few examples. Bodies such as the National Credit Regulator and the National Consumer Tribunal have been established, and provision made for considering complaints by those bodies excluding in some instances the ordinary court processes. Furthermore provision has been made for more informal dispute resolution mechanisms such as having claims of creditors against debtors to be dealt with by a debt counselor, alternative dispute resolution agent, consumer court or ombud with jurisdiction in order to resolve disputes or agreeing to a payment plan to bring payments under an agreement up to date [refer Section 129(1)(a) of the Act]. New concepts of over indebtedness, debt review and reckless credit also represent innovations to previous legislation.

In the case of *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009(2) SA 512(D) ("the *Prochaska* case") Naidu AJ considered prior consumer legislation in his interpreting of Section 129(1)(a) of the Act and specifically the phrase and observed as follows:

"In my view the present Act, with regard to the notice contemplated in S 129(1)(a) thereof represents a radical departure from its predecessor. Whereas the Credit Agreement, Act 75 of 1980 merely requires the credit receiver to post by prepaid registered mail and in this way, 'has notified the credit receiver' of the default, the present Act in S 129(1)(a) creates an obligation on the credit provider (when it decides to take such a course) to 'draw the default to the notice of the consumer in writing' … " [p524 of the case].

The facts briefly in the *Prochaska* case were that the respondent had defaulted in her payments on her overdraft facility and loan with the applicant. The respondent in concluding a loan agreement before had chosen an address in the agreement as a domicilium citandi and executandi. As security for the loan the respondent caused a notarial bond to be registered over loose assets owned by her business at an address other than the domicilium address. Before issuing summons on the default of the respondent, the applicant mailed the letter of demand required by Section 129(1)(a) of the Act to the business address instead of the chosen domicilium address. Respondent resisted the application for judgement on the basis that the said letter of demand was not sent to the agreed domicilium address and was therefore not 'delivered' in compliance with the Act. Naidu AJ after reviewing prior

consumer legislation concluded that applicant had not complied with Section 129(1)(a) of the Act …. It failed to prove that the said letter of demand had been sent to the agreed domicilium address. Accordingly the defence of the respondent was upheld and the application postponed sine die.

In the case of *Munien v BMW Financial Services (SA) (Pty) Ltd and another* [2009] JOL 23387 (KZN) ("the *Munien*-case) the applicant had fallen in arrears with his payments in terms of an installment sale agreement with the respondent in respect of a motor car. In a written agreement the applicant had chosen a certain domicilium address. In an application for rescission of judgement the applicant stated that he had left the chosen domicilium address and had not received the summons. Furthermore he contended that the letter of demand in terms of Section 129(1)(a) of the Act had not been delivered to him in compliance with the Act.

Wallis J discussed and considered various related provisions of the Act in conjunction with Section 129(1)(a) of the Act as well as the phrase and found that, despite the fact that the said letter had not come to the notice of the applicant, there had been compliance with Section 129(1)(a) of the Act read with Section 65 of the Act, or it being established by the respondent that the letter had been posted by registered post to the domicilium address chosen and therefore delivered as required by the Act.

In the case of *First Rand Bank Ltd v Dhlamini* [2010] JOL 25158 (GNP) (the *Dhlamini*-case) the facts were briefly that the applicant had issued summons against the respondent who had defaulted in his payments of a loan secured by a mortgage bond. The respondent resisted a subsequent application for summary judgement on the basis that the summons was premature since the applicant had not complied with the mandatory provisions of Section 129(1)(a) of the Act regarding the letter of demand. Applicant contended that it had complied with Section 129(1)(a) of the Act and the phrase by dispatching a letter by registered post to the chosen domicilium address of the respondent. Respondent contended that he had not received the registered letter. He established that the letter was received at a certain post office, but for reasons which he had been unable to establish no notification was sent to him to inform him that the registered letter was awaiting collection. The letter was not collected and returned to the sender, presumably the applicant.

Murphy J critically considered the *Prochaska* and *Munien* cases and examined the phase against the relevant sections of the Act. He came to the conclusion that the question whether there was compliance with Section 129(1)(a) of the Act and the phrase was not whether the notice had been 'delivered' to the consumer, but rather whether the credit provider has 'drawn the default to the notice of the consumer in writing'.

Since the respondent denied having received the registered letter, and in the absence of any other evidence establishing that he had received the same and that his default had been drawn to his notice by the applicant, his defence was upheld and the application postponed sine die to allow the applicant to comply with Section 129(1)(a) of the Act.

DISCUSSION

In considering the *Prochaska* decision and the reasoning of Wallis J, Murphy J observed among others as follows:

> "In other words, in my respectful opinion, Wallis J has erred by equating the requirement of bringing the default to the notice of the consumer with delivery.

He has mistakenly elevated the right of a consumer to receive documents by a certain method to an irrebuttable presumption of notice of the default arising on dispatch by one of the methods.

The learned Judge's observation in paragraph [12] of his judgment that "it would have been relatively easy to formulate a rule that made it clear that the notice had to be received and come to the attention of the consumer", misses the fact that the Legislature has indeed done so. The Legislature, it must be assumed, consciously did not use either of the words "deliver" or "serve" in Section 129(1)(a). It used the expression "draw the default to the notice of the consumer in writing". It speaks also of "providing notice". There are numerous provisions in the Act where the term "deliver" is in fact used (see Section 96(1) and (2); 108; 110; 111; 118(3); 121(2)(a); and 168). In various other provisions different modalities of communication are envisaged, such as: "give written notice" (Section 104(2)); "provide written directions" (Section 106(6)); "provide a written statement" (Section 110(4)); and "advise in writing" (Section 62). There is no basis for holding that substantive requirements of this order will necessarily be met should "delivery" take place as contemplated in Section 65 or Regulation 1. Section 129(1)(a) does not require a letter to be "delivered" to the consumer, or a notice to be served; it requires that the consumer's default be brought to his or her notice (attention) in writing. While of necessity some form of delivery or service will be needed to draw notice to the default, such alone is not enough. There must be delivery (or service) as well as notice or attention being drawn to the default.

What is more, and perhaps most importantly, an irrebuttable presumption of service or notice on mere dispatch would defeat the purpose of Section 129(1)(a). The object of the provision, in keeping with the objects stipulated in Section 3(h) and (i) of the Act, is to provide for a consistent and accessible system of consensual resolution of disputes arising from credit agreements, by means of a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements. Section 129(1)(a) deliberately aims at tailoring default disputes to the more appropriate processes of counselling, mediation, conciliation and other forms of contextually sensitive dispute resolution, it hopes that by deploying more imaginative methods, less rigid than the adjudication methods of the ordinary courts, it will achieve the other statutory objectives of promoting equity and correcting imbalances in negotiating power between consumers and credit providers in the interests of avoiding consumer over-indebtedness and reckless credit granting. The mechanism of an irrebuttable presumption of notice on dispatch would take

insufficient heed of those objectives, being, as it would be, more in line with the conventional or orthodox methods of litigation which the Act seeks to escape". (pp15 and 16 of the decision)

Otto commenting on the *Prochaska*-decision [in 2010 (73) THRHR pp136 – 144] observed as follows under the heading 'Evaluering en slotopmerkings'

"Ek stem nie saam met die beslissing in *Prochaska* nie. By 'n ander geleentheid is daarop gewys dat die Nasionale Kredietwet 'n nuwe wet is wat opnuut uitgelê moet word wanneer die kwessie onder bespreking weer aan die orde sou kom. Waar ander wetgewing *in pari materia* is, behoort beslissings dienaangaande 'n oorredende, indien nie 'n beslissende, rol te speel (Otto *The National Credit Act explained* 90). Daar was egter geen oortuigende redes waaraan skrywer dese kon dink om af te wyk van die uitleg wat die howe geheg het aan soortgelyke bepalings in die verlede nie. Gevolglik is aan die hand gedoen dat die verbruiker die risiko behoort te dra indien die kennisgewing hom nie bereik nie (*idem* 91. *Van Heerden* in *Scholtz* (red) par 12 4 7 stem hiermee saam"). (pp 142 – 143 op cit)."

The fact is that two judges in different provinces of the High Court namely Naidu and Murphy after having considered prior legislation carefully have come to the conclusion that the legislature has departed from prior legislation and have judiciously interpreted the phrase in Section 129(1)(a) of the Act in conjunction with other relevant sections of the Act.

The effect of this is that their decisions represent the legal position regarding the requirement of Section 129(1)(a) of the Act, which has to be observed by credit providers in order to successfully institute legal proceedings against defaulting consumers in terms of the Act.

According to the *stare decisis*-rule lower courts are bound by the said decisions (refer the decisions of *Fellner v Minister of the Interior* 1954(4) SA523(A) and *R v Manasewitz* 1933AD 180) until such time as a higher court decides that they are wrong or in the event of the intervention of the legislature.

CONCLUDING REMARKS

Having carefully considered the a foregoing decisions, in my opinion a court will have to approach the matter not in a mechanical way but exercising its discretion in deciding on all the facts presented before court whether 'the default was drawn to the notice of the consumer in writing', in other words a question of fact, to be decided bearing in mind that the onus to prove this is on the credit provider and not the consumer.

In the normal course of events in the absence of personal delivery of a letter of demand to the consumer in terms of Sections 129(1)(a) and 130 of the Act, the credit provider will not know in the case of non personal delivery, for example by delivering the said letter by ordinary post, per pre paid registered post to a chosen domicilium address or by electronic medium, whether there was delivery as required

by Section 129(1)(a) of the Act, before or after the service of a summons or other legal process against the consumer.

Should a consumer in a subsequent legal process in the event of non personal delivery take the point that there was non compliance with Section 129(1)(a) of the Act, the credit provider would in all probability be prudent to come to an agreement with the consumer to suspend further proceedings allowing for the consumer to be advised of the letter of demand and allowing another 10 day period to expire. This might prevent an adverse cost order by the court and an instruction in terms of Section 130 of the Act to the credit provider to comply with the relevant provisions of the Act.

FVA VON REICHE
ADDITIONAL MAGISTRATE, PRETORIA

A Last Thought

When judges get carried away by their personal convictions of where rightness and justice lie and stray too far from the established rules of the common law or the words of statutes, they create uncertainty. If those convictions are held on issues which are political, broadly or narrowly so, then they will arouse animosity as well as support. And if the political issues are serious and large, as are those of industrial relations, judicial pronouncements begin to lose their authority and their legitimacy.

Griffith *The Politics of the Judiciary*