THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 40577/2015

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

......23 February 2017..... ....
DATE SIGNATURE

In the matter between:

MAKHOSAZANA BABY DLAMINI **Applicant**

and

THE STANDARD BANK OF SOUTH AFRICA LTD **Respondent**

In re:

THE STANDARD BANK OF SOUTH AFRICA LTD **Plaintiff**

and

MAKHOSAZANA BABY DLAMINI **First Defendant**

JUDGMENT

RATSHIBVUMO AJ:

Introduction

[1] This is an application for a rescission of a default judgment that was granted by this court on 10 December 2015. The applicant submits as reasons for the application that the judgment was erroneously granted in that on the date of the order, no notice in terms of section 29 (Act 34 of 2005 – the Act) was issued, sent or received by her as the debtor.

Background

[2] The applicant and the respondent entered into a credit instalment agreement on 23 May 2014, for purchase of a motor vehicle the total cost of which was R1 338 109.20. Part of the agreement was that the applicant would make an initial payment of R120 000.00 followed by 71 monthly instalments of R18 584.85. Summons was issued on 17 November 2015 following the applicant's failure to keep up with the instalments, starting from January 2015. The records reflect that it was served by the sheriff on 20 November 2015 at the applicant's *domicilium citandi* by affixing a copy thereof to the outer or principal door at the given address. The records filed by the respondent further reflect that at the time the summons was issued, the applicant was in arrears of R92 070.88. There was no entry to defend the matter and as such, a default judgment was sought and granted as indicated above.

[3] Though not expressly contained in the applicant's papers, the application seems to be rooted in Rule 42 (1) (a) which provides that the court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. In order to determine if the default judgment was erroneously granted as averred by the applicant, it is apposite to consider and unpack the factual matrix upon which the application is predicated.

[4] Summons issued by the respondent contained a letter written in compliance with sec 129 dated 19 October 2015.[1] The respondent attached proof that the letter was dispatched by registered post on 19 October 2015 marked for the attention of the applicant at address no. […] B. Crescent, Bouvet Street, North Riding, 2188. This is the same postal address contained in the credit agreement referred to above as the applicant's address.[2] According to parcel tracking records uplifted by the applicant from the Post Office website, the letter reached North Riding Post Office on 22 October 2015 and the first notification to the recipient was sent the same day.

[5] The said letter was sent in accordance with the provisions of section 129 (1) of the Act which provides,

> "(1) Required procedures before debt enforcement - "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—

[1] See B1 attached to particulars of claim, page 39.
[2] See Credit agreement on page 23.

> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be;
>
> (ii) meeting any further requirements set out in section 130."

[6] The Act was amended in 2014[3] to give guidance in how the creditor would give effect to sec 129 (1) with the insertion of sec 129 (5) which provides,

> (5) The notice contemplated in subsection (1) (a) <u>must be delivered</u> to the consumer—
>
> (a) <u>by registered mail;</u> or
>
> (b) to an adult person at the location designated by the consumer. [own emphasis]

[7] The Constitutional Court held in *Sebola and Another v Standard Bank of South Africa Ltd and Another*[4] that where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery.

[8] Failure to giver proper notice to the other party resulting in judgment being granted in his absence can be a ground for rescinding the judgment in that it was erroneously given.[5] However proper service does not mean the papers should be served personally. Just as Msimang J observed in *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd*[6], it would be improper service of summons if it is served on a person in charge of the premises instead of an employee (in respect of service to a company)[7]. The fact that the applicant was not given the summons does not make the judgment granted pursuant to such service erroneous. It can however serve to prove that there was no wilful default on his part.[8] The documents filed by the

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[3] Sub-s. (5) added by s. 32 (c) of Act No. 19 of 2014.

[4] 2012 (5) SA 142 (CC) para 87.

[5] *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* [2008] 4 All SA 542 (N)

[6] *Supra*

[7] See Rule 4 (1) (a) (v) of the Uniform Rules of the High Court.

[8] In *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* the court found no wilful default on the part of the applicant who did not receive the summons; but the application for rescission was dismissed because the service was proper and in accordance with the rules.

respondent in applying for the default judgment show that the respondent had properly complied with sec 129 of the Act.

[9] In interpreting the judgment in *Sebola*, the court held In *Balkind v ABSA Bank*[9] the court interpreted the *Sebola* judgment adopting the following approach,

> "on my interpretation of *Sebola* and particularly in view of the absence of any section in the Act which requires proof of receipt by the consumer, or proof of delivery at the correct address, or more importantly proof that the notice actually came to the attention of the consumer, the degree of proof required by the judgment leaves room for a finding of fictional fulfilment of the principle that the s 129 notice had come to the attention of the consumer. For instance, a recalcitrant debtor who deliberately avoids the notification to collect a registered item, or, having received the notification, deliberately avoids collecting it, cannot hide behind non-receipt of the notice or be heard to say it did not come to his/her attention."

[10] It follows therefore that the mere fact that the applicant claims that she did not receive the sec 129 letter cannot in itself be a reason to find that the judgment was erroneous since it is not even a legal requirement for the respondent to prove that she received it.

[11] In the same breath as the submissions on the sec 129 letter above, the applicant alleges that she did not receive the summons. In an attempt to prove this, she attaches copies of the security books alleging that since she resides in a gated complex where any person entering is made to sign the book, the sheriff's entry would be reflected and it is not.[10] In so doing she attempts to cast doubt that the sheriff may have served the summons by affixing it to the door of her residence. No affidavit is attached by the security officers to the effect that the sheriff did not serve the summons as alleged. The copies of security books attached do not help her case at all because on closer observation, no person entering the premises was

[9] 2013 (2) SA 486 (ECG) para 47-48.
[10] See founding affidavit on page 10 para 7.9 and MBD2 on pages 26 and 27.

made to sign on them. The only entries in them are by security officers reporting on duty, off duty or any other incident on what they did while on duty. No signatures by visitors appear therein. In essence, these exhibits do not support the averments by the applicant.

***Bona fide* defence**

[12] The applicant submits that she has a *bona fide* defence in that had the respondent complied with the provisions of sec 129 of the Act, she would have proceeded to seek debt counselling. This submission begs for a consideration on what a *bona fide* defence is. While I would steer away from attempting to give a definition as to what *bona fide* defence means, it is however clear that the applicant at this stage is expected to show that she has a defence which if it is proved in a trial, it would result in the claim against her being dismissed.[11] In doing this, it is not expected of her to give full details of the defence, but to lay sufficient basis to that effect.

[13] It is expected at this stage that the applicant shows what her defence is to the case as contained in the particulars of claim. While the court would rescind default judgment where it appears that there was no compliance with sec 129 of the Act, this is not because that failure turns out to be a defence to a case; but because the creditor would have failed to observe the procedure just as one fails to observe the Rules. There is nothing that barred the applicant though, from seeking debt counselling provided for in sec 129 of the Act even before or without receiving such letter since she was aware of those rights.[12] She chose not to invoke those rights. The fact that the applicant was made aware of these in the credit agreement does not mean that the respondent was no longer bound to deliver the letter in terms

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[11] *Leo Manufacturing CC v Robor Industrial (PTY) LTD t/a Robor Stewarts & Lloyds* 2007 (2) SA 1 (SCA)

[12] See p. 26 under Clause 20 of the Credit Agreement entered between the applicant and the respondent, where the applicant was made aware of the rights she has under “Debt Counselling” which is the same information to be contained in the letter issued in terms of sec 129.

of sec 129 of the Act. The respondent had to show that a letter was sent by registered mail and reached the relevant post office, which was done *in casu*. The collection of the letter by the applicant is not a requirement. For her to aver that she did not receive the letter does not take the matter any further.

[14] The applicant has therefore failed to show that the respondent failed to comply with the provision of sec 129 of the Act. She also failed to show that she has a *bona fide* defence against the respondent's claim.

1. I therefore make the following order

   The application is dismissed with costs.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard:	**30 January 2017**
Judgment Delivered:	**23 February 2017**
For the Applicant:	**Mr. T Faku** **Faku Attorneys** **Johannesburg**
For the Respondent: **Instructed by:**	**Adv JC Viljoen** **Stupel 7 Berman Inc** **Germiston**