IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

In the matters between:

	18229/2010
FIRSTRAND BANK LTD t/a WESBANK	**Plaintiff**
and	
MRS ANINA WELTMAN-SHMARYAHU	**Defendant**

	18230/2010
FIRSTRAND BANK LTD t/a McCARTHY FINANCE a division of WESBANK	**Plaintiff**
and	
MRS ANINA WELTMAN-SHMARYAHU	**Defendant**

	18243/2010
FIRSTRAND BANDK LTD t/a WESBANK	**Plaintiff**
and	
MRS ANINA WELTMAN-SHMARYAHU	**Defendant**

JUDGMENT HANDED DOWN THIS FRIDAY, 10 DECEMBER 2010

CLEAVER J

[1] The defendant seeks leave to appeal against the judgment which I handed down on 25 October 2010 in terms whereof summary judgment was granted against the defendant.

[2] Four grounds were advanced in respect of which it was submitted that another court might reasonably come to a different conclusion from that which I arrived at.

(i) The method of delivery of the s 129 notice.

It was submitted on the strength of the *Rossouw* judgment[1] that service of the s 129 notice by the deputy sheriff could never constitute compliance with the provisions of s 129 if another method of delivery had been chosen by the defendant in the underlying contract.

In my view this submission, so broadly stated, cannot be correct. The intention of the legislature was to ensure as far as possible that the s 129 notice reaches the debtor, but as was pointed out in *Rossouw*, '*the legislature's grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer's shoulders*'.[2] If it is established that a debtor has received the notice, he or she would clearly not be able to avoid the consequences of such receipt by averring that the chosen method of delivery, or when no method had been chosen, one of the methods prescribed in s 65 (2), had not been utilised. In the matter before me I concluded, for the reasons set out in my judgment that the defendant's bare denial that she received the notice was insufficient and that her bona fides could therefore not be accepted in respect of that issue. I am not persuaded that another court might reasonably come to a different conclusion.

(ii) The cancellation of the agreement.

Defendant's counsel submitted in effect that even though the notice given to the defendant complied with the provisions of s 129 in its form, a further notice recording cancellation of the agreement was necessary before the plaintiff could issue summons for the return of the vehicle. I found that cancellation of the agreement was conveyed to the defendant, at least when the summons was served on her, and I am not persuaded

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1 *Benjamin Rossouw and Another v FirstRand Bank Limited t/a FNB Homes* Supreme Court of Appeal case no 640/2009 delivered on 30 September 2010.

2 At para 31.

that there is a reasonable possibility that another court might reasonably come to a different view.

(iii) The citation of the plaintiff.

This was dealt with fully in my judgment, but the defendant's counsel raised before me an issue which had not been raised on the papers, namely that the agreement concluded between the parties might be unlawful in terms of s 90 (2)(a)(ii) if it deceives the debtor. I confess that I have difficulty in following this point. The point appears to be that while the plaintiff is cited as Firstrand Bank Limited t/a Wesbank, two pages of the document record the agreement as being with Wesbank. As I mentioned in my judgment, on these two pages it is also made clear that Wesbank is a division of Firstrand Bank Limited.

(iv) Counsel submitted that it was clear from the opposing affidavit that the defendant was not endeavouring to buy time and that I should glean from the affidavit that she has a bona fide defence. Apart from a bald denial that she was in arrear in terms of any amount (I did not mention this in my judgment) the furthest she goes to put up any form of defence is to refer to the fact that since the time she concluded the agreement with the plaintiff, there had been changes in the interest rate applicable to the balance outstanding under the agreement.

Other aspects of the defence put up were dealt with in the judgment.

I am not persuaded that there is a reasonable possibility that another court might come to a different view in the matters raised in the preceding two sub-paragraphs.

[3] The application for leave to appeal is refused with costs.

R B CLEAVER