REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 6/7/15

CASE NO: 12910/2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

ASTFIN NORTH (PTY) LTD t/a ASSETFIN	Plaintiff
and	
JFA PRINTING	First Defendant
HENNING JOHANNES FOURIE	Second Defendant

J U D G M E N T

MAKGOKA, J

[1] This is an opposed summary judgment application. The plaintiff instituted action against the defendants for payment of R932 882.29, interest and costs on a scale of attorney and client. The claim arises from a written copy charge agreement concluded on 28 November 2011 between the plaintiff and the first defendant, in terms of which the first defendant hired rented a photo copier from the plaintiff on certain conditions. The second defendant has signed a deed of surety in terms of which he bound himself as surety and co-principal debtor with the first defendant for the payment of all the monies due and owing by the first defendant to the plaintiff. The copy charge agreement is partially governed by the National Credit Act 34 of 2005 (the NCA).

[2] The plaintiff alleges that the first defendant has breached the terms of the copy charge agreement by failing to make regular monthly repayments, and seeks summary judgment against both defendants. The first and second defendants oppose the application for summary judgment on two bases: alleged failure to comply with s 129 of the NCA and an attack on the quantum of the plaintiff's claim. I consider in turn, these contentions.

[3] The reason the defendants contend that the plaintiff has not complied with s 129 of the NCA is that the so-called track and trace report from the post office includes a statement 'out for service'. The law in this regard has now been crystallised by the Constitutional Court in the judgements of *Sebola*[1] and *Kubyana.*[2] The effect of the two judgments is essentially this: a credit provider is required allege that a notice was delivered to the relevant post office and that the post office would have secured delivery of a notification slip informing the consumer that an item is awaiting collection. This would lead to a reasonable inference that the notification reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office. As a consequence there is no onus on a consumer to show that the notice did not come to his attention.

[4] In the present case, the second defendant had chosen a post box at Paardekraal as the address for notices. From the track and trace report, the s 129 notice was dispatched at Halfway House on 21 August 2014. The notice reached Paardekraal post office on 1 September 2014. The post office at Paardekraal sent a 'first notification' to the second defendant. The second defendant does not say that he did not receive the notification from the post office that an item was awaiting delivery. Having regard to the effect of *Sebola* and *Kubyana* as summarised above, the onus is on the second defendant to rebut the inference that the notice has in fact reached him. He has placed no circumstances as to why the deeming provisions should not apply. I therefore find that the second defendant has failed to discharge the onus on him. There is therefore no merit in the contention that the plaintiff has not complied with the provisions of s 129 of the NCA.

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[1] *Sebola v Standard Bank of South Africa Ltd* 2012 (5) 142 (CC).
[2] *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) 56 (CC).

[5] I turn now to the defendants' attack on the quantum of the plaintiff's claim. It is argued that a service fee for maintenance fees was included in the monthly rental amount due by the first defendant, despite that the plaintiff was not entitled to such fees as such services were not rendered from June 2014. The defendants also contend that the plaintiff has failed to mitigate its damages. It is common cause that the plaintiff only took possession of the copier six months after the letter of demand had been sent, i.e after the alleged breach of the agreement had taken place. The upshot of this argument is that plaintiff's claim should be adjusted accordingly.

[6] The defendants also dispute the correctness of the certificate of the plaintiff's balance and attach their own schedule of payments. In terms of that schedule, the defendants conclude that the amount due and owing is R192 125. From all the above, it is clear that the ultimate amount still needs to be properly quantified. This constitutes a *bona fide* defence to the rest of the amount. I am therefore inclined to grant summary judgment in the undisputed amount. The determination of the balance of the amount should be deferred to the trial court. With regard to costs, the agreement makes provision for attorney and client costs in the event of enforcement of the agreement.

[7] In the result I make the following order:

1. Summary judgment is granted against the first and second defendants, jointly and severally, the one paying the other to be absolved, for:

   1.1 Payment of the sum of R192 125;

   1.2 Interest on the above amount at the prime rate plus 2% *per annum* calculated from 8 November 2012 until date of final payment;

   1.3 Costs of the action on the scale as between attorney and client scale.

2. With regard to the balance of the plaintiff's claim, the defendants are granted leave to defend. The costs with regard thereto are to be costs in the main action.

TM Makgoka
Judge of the High Court

Date of hearing:	30 June 2015
Judgment Delivered:	6 July 2015

Appearances

For the plaintiff:	Adv. JH Wildenboer
Instructed by:	Van der Westhuizen Attorneys, Pretoria
For the defendant:	Adv. M Jacobs
Instructed by:	Lacante Henn Inc., Pretoria