REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO: 38463/2012

27/3/2013

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED.

27/3/2013 DATE

SIGNATURE

In the matter between:

STANDARD BANK OF SA LIMITED	**APPLICANT**
and	
OTTO JEPPE ANDREW SNYMAN	**RESPONDENT**

J U D G M E N T

KUBUSHI, J

[1] The applicant's cause of action is based on the respondent's breach of the Instalment Sale Agreement entered into between the applicant and the respondent. The respondent fell in arrear with his monthly instalments as *per* the agreement and the applicant, amongst others, is claiming return of the motor vehicle which is the subject of the Instalment Sale Agreement.

[2] The respondent is resisting the application for summary judgment. He filed his opposing affidavit out of time. At the first hearing of the application the respondent had not filed his opposing affidavit. The application was, as a result, postponed to give him an opportunity to do so. At the next hearing the matter was postponed again to give him an opportunity to apply for condonation for the late filing of his opposing papers which had already been filed by then. When the matter appeared before me the respondent had filed an affidavit explaining why the opposing papers were filed out of time and requesting the court to condone the late filing. The applicant's counsel opposed the application on the ground that the respondent should have filed a substantive application. After argument by both counsel I granted the condonation.

[3] At the beginning of 2012 the respondent encountered financial difficulties and as a result defaulted in his payments. On 2 August 2012 he was served with a summons and he entered appearance to defend on 24 October 2012. Somewhere between the date of service of the summons and the appearance to defend the respondent applied for debt review. The applicant was informed about the application on 23 October 2012. Shortly after receipt of the appearance to defend, on 14 November 2012, the applicant delivered and filed an application for summary judgment on the respondent. On 5 December 2012 the applicant was provided with a Form 17.2 informing it that the

respondent's application for debt review was successful and that his debt obligations were in the process of being restructured. Despite the Form 17.2 the applicant is proceeding with the summary judgment application.

[4] In resistance to the summary judgment, the respondent raised one point *in limine* and a defence on the merit. The point *in limine*, which I will deal with first is that he did not receive the notice which the applicant is compelled in terms of section 129 (1) of the NCA to bring to his notice. His defence on the merit is based on section 79 and section 85 of the National Credit Act (the NCA).

NON-COMPLIANCE WITH SECTION 129 (1) OF THE NCA

[5] It is the applicant's case that it complied with the requirements of section 129 (1) of the NCA. The applicant's counsel contended in argument that even though, as *per* the track and trace report, the notice was returned unclaimed to the applicant, the applicant complied with the requirements of section 129 (1) as enunciated in the **SEBOLA** – judgment. The notice was sent by registered post to the *domicilium* of the respondent and the track and trace report shows that it was delivered to the correct post office.

[6] The respondent does not dispute the address that was used by the applicant, he simply avers that he did not receive the notice.

[7] The applicant's counsel is correct a credit provider seeking to enforce a credit agreement must aver and prove that the notice was delivered to the consumer. Where the credit provider posts a notice, *per* registered mail, proof of a 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 indications constitute sufficient proof of delivery. In practical terms this means that the credit provider must obtain a post-despatch 'track and trace' print-out from the website of the South African Post Office as proof that the notice reached the correct post office. This the applicant did. See **SEBOLA AND ANOTHER v STANDARD BANK OF SOUTH AFRICA LTD** 2012 (5) SA 142 (CC) at para [75], [76] and [87].

[8] However, it was further held in the **SEBOLA** – judgment that if, in contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim. If, the consumer asserts that the notice went astray after reaching the post office, or was not collected, or not attended to once collected, the court must make a finding whether, despite the credit provider's proven efforts, the consumer's allegations are true. See **SEBOLA AND**

ANOTHER v STANDARD BANK OF SOUTH AFRICA LTD AND ANOTHER above at paras [79] and [87].

[9] In order to satisfy the requirements of section 129 (1), the respondent must not only receive the notice but must also take notice of it. The only reliable evidence before me on this aspect is the track and trace report. The report proves that the notice reached the correct post office as alleged by the applicant. However, it also proves that the notice did not come to the attention of the respondent as it was returned unclaimed to the applicant.

[10] The court in the **SEBOLA** – judgment stated also that coupled with proof that the notice was delivered at the correct post office, it may reasonably be assumed in the absence of contrary indication, and the credit provider may credibly aver as the applicant did in this instance, that the notification of its arrival at the post office reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office. See **SEBOLA AND ANOTHER v STANDARD BANK OF SOUTH AFRICA LTD AND ANOTHER** above at para [77].

[11] It is indeed so, as is apparent from the track and trace report, that a notification for collection of the notice from the post office was sent to the respondent. There is however no evidence that indicates what happened to the notification once it was dispatched to the *domicilium* address of the respondent. What we know is that the respondent did not collect the notice from the post office because it was returned unclaimed to the applicant.

[12] The evidence before me shows that as early as October 2012, after service upon him of the summons, the respondent approached his attorney for assistance to apply for debt review. This to me is not indicative of a man who is trying to evade payment of his debts. To the contrary, the evidence shows that he is zealous to have his debts, including that of the applicant, paid. There is no specific reason, in my view, why the respondent, if he had received the notification, would not have collected it from the post office. The inference I can make from the proven facts is that the notification did not reach him.

[13] I am therefore satisfied that despite the applicant's proven efforts, the respondent's allegations are true, he did not receive the notice. Since he did not receive the notice it follows that the applicant did not comply with the provisions of section 129 (1) of the NCA. The respondent's point must be upheld.

[14] This, however, is not the end of the matter. Non-compliance with the provisions of section 129 (1) does not lead to a nullity but to a pause of the proceedings. Section 130 (4) (b) makes it clear that where a credit provider has not complied with the relevant provisions of the NCA by for example, failing to first provide notice to the consumer, as contemplated in section 129 (1) the action is not void. See **SEBOLA AND ANOTHER v STANDARD BANK OF SOUTH AFRICA LTD AND ANOTHER** above at para [53].

[15] The bar on proceedings is thus not absolute, but only dilatory. I must, therefore, adjourn the matter, and make an appropriate order requiring the first respondent to complete specific steps before resuming the matter.

[16] The Instalment Sale Agreement does not set out the manner of delivery of notices to the respondent. I am, therefore, of the view that in order to ensure that the notice reaches the respondent an order that the notice be served by the sheriff will suffice.

[17] The respondent is the successful party in this matter and is entitled to the costs of this application. However, he was ordered on 18 December 2012 to pay the wasted costs on the scale as between

attorney and client. He was ordered again on the 6 February 2012 to pay the applicant's wasted costs for the postponement on an attorney and client scale.

[18] Consequently I make the following order:

a. the summary judgment application is postponed *sine die*.

b. The applicant is ordered to serve the respondent with another notice in terms section 129 (1) of the NCA before the matter can be resumed.

c. The notice must be served by the sheriff at the respondent's *domicilium* address.

d. the applicant to pay the costs of the application.

e. The respondent to pay the wasted cost occasioned by the postponement of 18 December 2012 and 6 February 2013 on an attorney and client scale.

EMKubushi

E. M. KUBUSHI
JUDGE OF THE HIGH COURT

HEARD ON THE	**: 06 MARCH 2013**
DATE OF JUDGMENT	**: 27 MARCH 2013**
APPLICANT'S COUNSEL	**: ADV E. DE LANGE**
APPLICANT'S ATTORNEY	**: HACK STUPEL & ROSS**
RESPONDENT'S COUNSEL	**: ADV L. K. VAN DER MERWE**
RESPONDENT'S ATTORNEY	**: CAWOOD ATTORNEYS**