

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO.: 5722/2010

In the matter between

WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED PLAINTIFF

and

NAFEESA JOGEE DEFENDENT

JUDGMENT

MOKGOHLOA J

- [1] The plaintiff instituted action against the defendant for:
- [1.1] termination of the motor vehicle financing agreement entered into between the parties;
 - [1.2] the return of the 2003 Mercedes Benz C180K Classic model motor vehicle bearing engine number: 27194630109314 and chassis number WDC203046RR101127;
 - [1.3] costs of the action on a scale as between attorney and client including such costs as the plaintiff may incur in locating, removing and disposing of the vehicle.
- [2] On 29 May 2007 and at Durban the parties entered into a written instalment sale agreement in respect of a Mercedes Benz motor car. The defendant was obliged to pay monthly instalments of R3 352.25 to the plaintiff in terms of the agreement. The defendant accepts that she fell into arrears with her repayments. She however pleaded that she was under debt review and that an oral agreement to re- arrange the defendant's obligation was entered between

the parties.

[3] The plaintiff pleaded further that it has complied with the defendant's request for the debt review in terms of section 86 of the National Credit Act 34 of 2005. ("the Act".) Furthermore, that the notice of termination of the debt review was given to the defendant, the debt counsellor involved, and the National Credit Regulator after the elapsing of 60 business days. Accordingly, the plaintiff pleaded that it terminated the application of debt review after 10 business days had elapsed following the notice of termination.

[4] The main issues for determination are therefore the following:

- (1) Whether the plaintiff terminated the defendant's debt review, inclusive of the question as to whether the plaintiff sent the section 86(10) notice in terms of the Act;
- 2) Whether the plaintiff and the defendant entered into an oral agreement to re-arrange the defendant's obligations to the plaintiff, inclusive of the question of whether the plaintiff's standard terms and conditions excluded such an oral agreement.

[5] I turn to deal with the main issues.

[6] The plaintiff called a witness by the name of Priscilla Govender an employee of the plaintiff. Ms Govender testified that the plaintiff operates a smac system in terms of which the interaction between the client and the plaintiff is recorded in a computer based format. Exhibit B was handed in during the trial which is a copy of the smac report. In terms of Exhibit B on 22 December 2008 a notice in terms of section 86 (10) of the Act was printed off

the system and that the usual procedure for the plaintiff was that those section 86 (10) notices were sent via ordinary mail to the recipients and addresses thereof.

[7] The defendant on the other hand denies that she received any section 86 (10) notice.

[8] The plaintiff submitted that in terms of the written agreement, the address of 1 Tudor Place, Berea was the address chosen by the defendant for service of all documents. It further argued that the section 86(10) notice was sent via ordinary postage which is a prescribed method of service in terms section 65 (2) (a) of the Act. Counsel for the plaintiff referred me to a case of *Munien v BMW Financial Services (SA) (Pty) Ltd 2010 (1) SA 549 KZN at para 23* and submitted that the plaintiff has discharged the onus of proving that it sent the section 86 (10) notification terminating the debt review and accordingly that debt review was lawfully cancelled by the plaintiff in or about January 2009 after the expiry of ten days referred to in that notice.

[9] Section 86 (10) of the Act provides:

“(10) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to

- (a) the consumer;
- (b) the debt counsellor; and
- (c) the National Credit Regulator,

at any time at least 60 business days after the date on which the consumer applied for the debt review.”

[10] The section does not state the manner in which the credit provider is to furnish a defaulting consumer with the notice to terminate the review. Section 65 of the Act, which deals with the consumer's right to receive documents provides:

- “(1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.
- (2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must –
- (a) make the document available to the consumer through one or more of the following mechanisms-
 - (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;
 - (ii) by fax;
 - (iii) by e-mail; or
 - (iv) by printable web-page; and
 - (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).”

[11] Section 96 which deals with the address for delivery of legal notices (including section 86 (10)), is relevant for present purposes and must be read with section 65 (2). It provides:

- “(1) Whenever the party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, or a this Act or any other law, the party giving notice must deliver that notice to the other party at-
- (a) the address of that other party as set out in the agreement, unless paragraph (b) applies; or
 - (b) the address most recently provided by the recipient in accordance with subsection (2).

(2) A party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered mail, or electronic mail, if that other party has provided an email address.”

[12] The plaintiff submitted that in terms of the written agreement, the address of 1 Tudor Place, Berea, was the address chosen by the defendant for service. It further submitted that ordinary postage is a prescribed method of service in terms of section 65 (2) (a) of the Act. The plaintiff further referred to clause 16 of the written agreement which provides:

“16.1 It is agreed that the addresses given on the schedule to this agreement shall be the place to which all post, notices or other communication are to be sent to you and you agree that such communications shall be binding you.

16.2. You must let the seller know immediately in writing of any change in your address and the new address you give must not be a post box or private bag number. If you fail to give notice of change of address the seller will be entitled to use the address it has for you, for all purposes, even if you are no longer there.

16.3 You accept that you will be deemed to have received a notice or letter 5 days after posting the address you have given.

[13] It is clear that the agreement does not prescribe the method of posting. In my view, registered mail, which is not the chosen method and is also not one of the options provided in section 65(2), does not offend the provisions of the section. Registered mail is a more reliable means of postage which can be easily proved and cannot harm either party’s interests.

[14] This brings me to the method the plaintiff attempted to use in proving compliance with the provisions of section 86 (10). A copy of a smac report was handed in as exhibit B. From the perusal of exhibit B one find the

following entry on 22 December 2008 ‘MC Cloete Correspondence section 86(10)- termination of debt review notice to client – customers residential’. According to Ms Govender, this entry was made by a certain Mr Cloete. However, Cloete was not called to confirm that he did send the section 86(10) notice to the defendant. Furthermore, the plaintiff attached a copy of a letter purported to be a section 86 (10) notice. This letter is not signed and does not show whether it was posted or not.

[15] In *Rossouw and Another v Firststrand Bank Ltd* 2010 (6) SA 439 (SCA), the bank in attempting to prove that a section 129 (1) and 130 notices were sent to the defaulting consumer, attached to its summons documents titled ‘Notice in terms of section 129(1) of the Act’ and ‘Certificate of compliance in terms of section 129(1) of the National Credit Act’, respectively. During the summary judgment hearing, the bank handed in another document which was referred to as proof that the notice had been delivered by registered mail.

[16] Maya JA dismissed the appeal by the bank and stated the following at 451 C-G:

“[37] ... (T)he document could not have assisted the bank’s case. On its face, it lists the names and address of the appellants among the addresses to which registered letters are to be sent. But, it further requires confirmation of the number of the letters to be posted, the signature of the client sending the letter or letters, the signature of the ‘acceptance officer’, presumably the post office officials processing the transaction, and the date of the transaction. None of these entries were made. These omissions, which the bank did not explain, materially affect the document’s reliability. As it stands, it does not confirm that a registered letter was actually sent to the appellants. Even if it did, without the date it is not possible to link it to the sending of the relevant notice, particularly in view of the fact that an earlier one was previously sent in 2008.

[38] In the circumstances, the bank did not prove that it delivered the notice. As pointed out earlier, ss 129 (1) (b)(i) and 130 (1)(b) make this a peremptory prerequisite for commencing legal proceedings under a credit agreement, and a

critical cog in a plaintiff's cause of action. Failure to comply must, of necessity, preclude a plaintiff from enforcing its claim; this despite the fact that in this matter it was not disputed that the appellants were in arrears and thus breached their contractual obligations. The bank, therefore, failed to make out a case for summary judgment and it ought to have been refused. It is unnecessary to consider the third issue in the light of this finding."

[17] In my view, the approach adopted by the Supreme Court of Appeal *supra*, regarding proof of posting of the section 129 notice is equally applicable to the proof of giving notice or posting of the section 86(10) notice. In the circumstances, the plaintiff did not prove that it delivered the section 86(10) notice. Consequently, the plaintiff cannot enforce the payment of the debt until the debt review has been properly terminated.

[18] On the second issue of whether there was an oral agreement to re-arrange the defendant's obligation to the plaintiff, Mr Havemann, on behalf of the defendant, conceded correctly so in my view, that there is no sufficient evidence to prove that.

[19] I however find that the plaintiff has failed to discharge the onus of proving that the section 86(10) notice was indeed sent to the defendant and therefore the debt review was not lawfully terminated

Order

The plaintiff's case is dismissed with costs.

JUDGE MOKGOHLOA

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