




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

8/11/2012

CASE NO: 55503/10

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO
(3)	REVISED.
	<div style="display: flex; justify-content: space-between;"> <div> <p>8/11/2012</p> <p>DATE</p> </div> <div> <p></p> <p>SIGNATURE</p> </div> </div>

In the matter between:

**THE STANDARD BANK OF SOUTH AFRICA LIMITED**

**APPLICANT**

and

**MOSHOMO LEVIN KUBYANA**

**RESPONDENT**

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**J U D G M E N T**

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**LEDWABA, J:**

Introduction

- [1] On or about the 28 September 2010 the plaintiff issued summons against the defendant for an order in the following terms:

1. *Confirmation of cancellation of the agreement;*
2. *Return of the following goods:*

*2007 GWM S/CAB STD*

*REGISTRATION NUMBER: UNKNOWN*

*ENGINE NUMBER: D070925464*

*CHASSIS NUMBER: LGWCA23728A068800*

3. *Payment as pre-estimated liquid damages, the total amount of payables not yet paid by the Defendant being R78 447.92 minus the value of the goods as at the date on which the plaintiff is placed in possession of same;*
4. *Interest on the amount mentioned in 3@ 13.800% per annum;*
5. *Costs of suit;*

- [2] At the commencement of the trial the parties' legal representatives agreed that the common cause facts are the following:

1. *The citation of the parties with the exception of the reference to the plaintiff as a female. The plaintiff is a male.*

2. *The plaintiff and the defendant entered into an instalment sale agreement annexed as **annexure "H"** to the summons.*
3. *The terms of the instalment sale agreement.*
4. *The instalment sale agreement is subject to the National Credit Act.*
5. *The plaintiff dispatched a notice in terms of section 129 to the defendant.*
6. *A copy of the notice is annexed to the summons as **annexure "B"***

[3] The facts that the parties regarded to be in dispute are the following:

1. *Did the defendant or the Plaintiff breach the instalment sale agreement?*
2. *If the defendant or the plaintiff breached the instalment sale agreement did I defendant or plaintiff remedy its breach thereof in time?*
3. *Was the defendant in default when the summons was issued and served?*
4. *Did 10 business days elapse after the delivery of the notice in terms of section 129 of the National Credit Act before the plaintiff issued and served the summons?*
5. *Was the defendant in default when the summons was issued?*

6. *Was the plaintiff entitled to debit the insurance premiums of Hollard Insurance Company against the defendant's account from December 2009?*
7. *Does the matter fall within the jurisdiction of the Magistrate's Court?*

[4] The defendant filed a special plea. His legal representative, Mr Tswage argued that the court should first deal with a special plea before merits are entertained. Mr Ferreira, on behalf of the plaintiff, on the contrary submitted that special plea and the merits should be dealt with at the same time.

[5] After listening to the submissions, I ruled that the special plea and merits be dealt with together.

[6] Plaintiff called four witnesses and the defendant closed its case without calling any witnesses.

#### The Pleadings

[7] Since the facts which are common cause and those that are in dispute have been identified; I think it will be convenient to quote certain parts of the pleadings before I summarise the evidence of the plaintiff's witnesses.

- [8] In paragraphs 23-26 the particulars of claim the plaintiff made the following allegations:

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*The Defendant breached the agreement in that:*

- a. The defendant did not make the punctual payments as set out in annexure “A”;*
- b. As at the 10<sup>th</sup> SEPTEMBER 2010 the defendant is in arrears in the amount of R16 259.90; and/or.*

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*As the agreement and the goods subject to the agreement fall within the ambit of the National Credit Act, the plaintiff complied with the provisions of Section 129 of the National Credit Agreement’s Act by dispatching the following Notices in terms of Section 129:*

- 1. A notice requiring the Defendant to pay the amount of R10 780.79 within ten (10) days as of date of posting, being 15<sup>th</sup> July 2010.*

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*The said Notice in terms of Section 129 was sent to the Defendant’s **domicillium citandi et executandi** .*

*The defendant failed to comply with the Notice in terms of Section 129."*

[9] The defendant's special plea read as follows:

*" Defendant pleads that the above Honourable Court has no jurisdiction to hear the plaintiff's claim as the plaintiff has not complied with the provisions of the National Credit Act and/or the terms of the Instalment sale agreement."*

[11] The defendant did not give evidence and the argument of his legal representative was mainly based on what he alleged in paragraphs 2 and 3 of his plea. The plea reads as follows:

*"2.1 The defendant deny the contents of this paragraph, and the applicant/Plaintiff is put to the proof thereof. Defendant further plead that as at the date of issuing the summons, 28 September 2010, by the Applicant/Plaintiff against Defendant, the said instalment sale agreement account was up to date, and/or not in default and/or unremedied default."*

2.2 Defendant further plead that the Applicant/Plaintiff is the one who is in breach of the said Agreement, not Defendant, for the reasons set out hereinunder at paragraph 3.

3.

3.1 Defendant deny the contents of this paragraph, and the Applicant/Plaintiff is put to the proof thereof. Defendant further submit that, if there was any default by Defendant, it was remedied within the prescribed time periods, as provided for in terms of clause 12.1.1 of the agreement, hereunder.

3.2 Defendant further plead that defendant made payments in terms of the instalment sale agreement, clause 12.1 thereof, provides as follows:

12.1 default in terms of this Agreement will occur if:

12.1.1 You fail to make repayment in full, on or before the payment date, of any amount (s) owing by you, **or**

12.1.2 You breach this Agreement, or any other Agreement between us, and fail to remedy the breach within the time period specified in our written notice to you; or

3.3 Defendants submit that clause 12.2 thereof, further provides that:

*If you are in default of your obligations under this agreement we will provide you with a written notice of such default requesting that you rectify...*

3.4 Defendant furthermore submit that clause 12.3 provides that:

12.3. We may approach a court for an order to enforce this agreement if:

12.3.1 You are and have been in default under this agreement for at least 20 (twenty) business days and at least 10 (ten) business days have elapsed since the delivery of the notice...

3.5 Defendant is advised, which advice defendant accept, that the above provisions from the agreement, are provided therein in order to comply with the provisions of the National Credit Act, 2005 (Act 34 of 2005).

3.6 Defendant further plead that the defendant did not breach and/or unremedially breach the agreement , and/or breach the agreement to warrant legal action. and the Applicant/Plaintiff is put to the proof thereof. The honourable Court is respectfully referred to the instalment sale agreement statement of account dated 21<sup>st</sup> October 2009 with a current balance of R125.09-, and Deposit Slips for the payments Defendant made in terms of the clauses cited hereinabove, marked as annexure as ANNEXURES "A"- "NN" and "OO" respectively."

#### Evidence of Plaintiff's witnesses

[11] The plaintiff first witness Ms Dineo Seleka, the accounts manager, explained how their system is operated and how information is recorded regarding clients who are in arrears with their instalments. Importantly, she said defendant did not furnish the plaintiff with the insurance details of the vehicle.

[12] She further said:

12.1            on 23 April 2009 at 16:25 the defendant telephonically confirmed that he received statements, he confirmed his contact details and he alleged that he was insured with Hollard Insurance Company; and

12.2            on 25 July 2009 at 13:12 the defendant was telephonically contacted and he confirmed that he received statements and that he was insured with

Outsurance but that he could not provide any policy number or details (see A51).

12.3 on 31 December 2009 at 10:13 defendant confirmed telephonically and alleged that he has his own insurance and will mail the detail thereof to the plaintiff.

12.4 on 16 February 2010 at 11:29 defendant promised to fax through his insurance info and advised that he does not need Hollard insurance (See A57).

12.5 on 26 February 2010 at 09:21 Ms Seleka telephonically spoke with the plaintiff when he informed her that he never requested insurance from the plaintiff, she explained to him that if he did not have his own insurance he would be liable to pay the Hollard debits and when the plaintiff said that he will fax through details of his own insurance (see A58).

12.6 on 11 October 2006 at 11:48 defendant confirmed telephonically that he would pay R10 345, 33 (this amount clearly included the insurance premiums) on or before 11 June 2010 (see A60).

- [13] Mr R Sema the manager in the credit rehabilitation and recovery department testified that the section 129 letter was addressed to the defendant's address by registered post and was posted on 16 July 2010.
- [14] He further confirmed that according to the Track and Trace document the letter was returned to the plaintiff. see bundle A page 22 and 23.
- [15] He further confirmed that according to the statement see bundle A. On 21 July 2010 the defendant's arrear was R10 780, 79 and when summons was issued on 28 September 201 arrear was R13 756, 88.
- [16] Ms Tejal Herrie an employee of the Outsurance Insurance Company testified that according to their records defendant's vehicle was insured from 9 November 2007 and the cover was cancelled in January 2009.
- [17] Mr H van der Watt from meridian explained that according to their records defendant's vehicle insurance policy commenced on 7 September 2012.
- [18] It is clear that when a letter of demand was dispatched and when summons was issued the defendant did not have insurance cover on the vehicle

organised by him. The insurance on the vehicle was the one arranged by the plaintiff in terms of the Instalment Sale Agreement.

[19] The court will have to decide this case on the evidence of the plaintiff's witnesses and the pleadings.

[20] The documents clearly show that plaintiff and defendant agreement is regulated by the NCA.

[21] The plaintiff's statement shows that:

21.1 the account was in arrear on 21 July 2010 being the date that the section 129 notice was received at the relevant post office in the amount of R10 780, 79.

21.2 on the 28 September 2010 when the summons was issued the arrear amount was R13 756, 88

21.3 on the date that the summons was served namely 6 October 2010 the arrear amount was R16 056, 88

- [22] The defendant did not give evidence to dispute the amounts in the statement. Entries in bank books constitute prima facie evidence of the recorded transactions.

**See: *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation) 1998 (1) SA 811 (A) at 823B***

- [23] During the arguments it became clear that the defendant's legal representative relied on the not yet unreported case of Absa Bank Limited v Bhekani Enerst Mkhize and Tholakele Confidence Mkhize case no 4084/2012 Kwazulu Natal High Court Durban to support plaintiff's allegation that there was no compliance with the NCA.

- [24] He submitted that since the Track and Trace report reflected that the section 129 letter was returned to the plaintiff.

- [25] What is apparent in this case is that when the Section 129 letter was sent the defendant had been in arrear even when summons was issued or served defendant still had arrears. PJ Olsen AJ in the Bhekani case analysed Sebola and Rossouw cases and his conclusion on the facts of the case before him. Sebola case does not overrule the Rossouw case.

- [26] In *casu* the plaintiff satisfied what was stated in Rossouw case when he dispatched the letter. The defendant did not put his version before me to show that there is no fault on his part when the letter was not collected from the post office.
- [27] In my view, if the NCA wanted the letter to be personally served it could have clearly stated that. The plaintiff complied and the defendant failed to give an explanation why the letter did not reach him. There must be a balance between the interest of the consumer and the creditor.
- [28] In my view Rossouw and Sebola cases clearly state that see 96 (1) and 168 of the NCA do not require proof of actual delivery which also implies that there is nothing in the NCA stating that there should be actual delivery of the section 129 Notice.
- [29] In *casu*, the notice was returned to the sender. I should determine whether is it necessary for the credit grantor to take other steps, e.g. instruct the sheriff to serve notice personally on the consumer.
- [30] Paragrapg 87 in Sebola case reads as follows:

*" The requirement that a credit provider provide notice in terms of s 129 (1) (a) to the consumer must be understood in conjunction with s 130, which requires delivery of the notice. The statute, though giving no clear meaning to 'delivery' requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer. 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. 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 it finds that the credit provider has not complied with s 129 (1), it must in terms of s 130 (4) (b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed."* (own underlining).

- [31] In my view the mere fact that the notice was returned to the sender does not *per se* mean that the credit grantor has an obligation to use other means to see to it that the consumer receives the notice unless there is an indication that there was no fault on the part of the consumer. If the notice was returned to the sender, that cannot, in my view, be conclusive evidence that justifies the resending of the notice without checking the explanation of the consumer.

[32] The consumer should clearly aver that the notice did not reach him or her and show why the notice did not reach him or her. The careful balancing of the rights and responsibilities of credit providers and consumers should be maintained.

[33] In paragraph 75 of *Sebola* case the court said

*“despatching is not enough and further said the statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by s129 (1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.”*

[34] According to the Track and Trace record the notice was delivered to the correct post office and in the absence of any explanation from the defendant why he did not collect the notice. I am satisfied that the credit provider did what it is required to do to comply with the NCA.

[35] According to Bundle A p 23 notification of the arrival of the notice was sent to the consumer address and there is an obligation or an expectation that a

reasonable consumer to retrieve the item from the post office. The defendant failed to explain why did he not collect the item.

[39] I therefore make the following order:

1. The cancellation of the agreement is confirmed;
2. The defendant is ordered to return to the plaintiff forthwith the following goods:

2007 GWM S/ CAB STD

REGISTRATION NUMBER: UNKNOWN

ENGINE NUMBER: D070925464

CHASSIS NUMBER: LGWCA23728A068800

3. Prayer 3 and 4 of the particulars of claim are postponed sine die;
4. Defendant is ordered to pay the costs.



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**AP LEDWABA**  
**JUDGE OF THE HIGH COURT**