IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

2018.05.31
DATE

SIGNATURE

CASE NUMBER: 1658/17
DATE: 31 May 2018

THOMAS PETER MORE — Applicant

V

BMW FINANCIAL SERVICES — Respondent

JUDGMENT

MABUSE J:

[1] This matter came before me as an application for rescission of a judgment that the Respondent had obtained by default against the Applicant on 19 September 2017. It is opposed by the Respondent.

[2] For purposes of convenience, I will refer to the parties by the names they chose to call themselves in the main action, in other words, to the Respondent as the Plaintiff and to the Applicant as the Defendant.

[3] The Plaintiff is a company with limited liability duly incorporated as such in terms of the company statutes of this country. It has its registered address and principal place of business at 1 Bavaria, Randjiespark, Midrand. The Defendant is described as a major male who had chosen its *domicilium citandi et executandi* at 71 Riverside Park Estate, Riverside, Nelspruit, within the province of Mpumalanga.

[4] According to the Defendant's founding affidavit the application for rescission was launched in terms of Rule 31(2)(b) or Rule 31(5)(d) as set out in the Defendant's counsel's heads of argument, on the basis that the Plaintiff had not, before the commencement of the action that led to the default judgment that is sought to be set aside, complied with the provisions of s 129 of the National Credit Act No. 32 of 2005 ("the NCA"). Furthermore, the application is launched in terms of Rule 42(1)(a) of the Uniform Rules of Court on the basis that had his attention been drawn to the fact that there had been no compliance with the provisions of s 129 of the NCA, the registrar would not have granted the default judgment against the Defendant.

[5] It is only proper, at this stage, to point out that although this matter is an application for rescission of a default judgment, the defendant also seeks the following relief, according to the notice of motion:

"1. Ordering that the warrant of attachment and delivery of goods (annexed as "TPP2") be stayed and/or held over pending the outcome of this rescission application;

2. condoning the late filing of this rescission;

4. *ordering that the costs of this rescission application are to be paid by the Respondent, and in the event that this application is opposed by the Respondent, are to be paid on attorney and client scale."*

During argument, both counsel paid more attention to the application for rescission and less to the other aspects of the notice of motion.

[6] It is not in dispute that the impetus of the Plaintiff's action was the Defendant's default in failing to comply with a material term of an Instalment Sale Agreement concluded by and between the parties on 17 July 2013 at Nelspruit, which agreement was subject to the provisions of the NCA.

[7] As a consequence of the said default, the Plaintiff was entitled to take action against the Defendant in order to enforce compliance by the Defendant, with the terms of the said agreement. But before setting out to launch an action against the Defendant, the Plaintiff had to comply with the provisions of s 129 of the NCA which provides as follows:

"129(1) If the consumer is in default under credit agreement, the credit provider –

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intention that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before:

(i) first providing notice to the consumer as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130."

[8] The biggest question in this application for rescission is whether before commencing litigation to enforce the terms of the Instalment Sale Agreement, the Plaintiff had complied with the requirements of s 129 of the NCA. Relying on the authority of **Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 CC, paragraph 54** thereof, Mr Spiller LM, counsel for the defendant, contended that the Plaintiff had not complied with the requirements of s 129 of the NCA. On the basis of such non-compliance he contended, relying on the authority of **Kgomo and Another v Standard Bank of South Africa and Others 2016(2) SA 184 GP**, that if default judgment had been granted in the face of a defective s 129 notice, such judgment had been erroneously granted.

THE DISPUTE AROUND THE S 129 NOTICE

[9] On 1 March 2017, the Plaintiff wrote a letter to the Defendant. The terms of the letter and the fact that such terms satisfy the requirements of the statutory notice in terms of s 129 of the NCA, are not in dispute. Accordingly, for all intent and purposes, the said letter constitutes a proper notice in terms of s 129. This notice was addressed, quite correctly so and in keeping with the parties' Instalment Sale Agreement, in particular clause 15.1 thereof, to the Defendant's chosen *domicilium citandi et executandi*. This fact also is not in dispute. On 6 March 2017 the s 129 notice was duly sent to the Defendant to his *domicilium citandi et executandi* by registered post. It was posted at Halfway House Post Office. The history of the movement of the said notice is clearly shown on the Track and Trace Report attached to the papers as Annexure 'G35'.

[10] The importance of the Track and Trace Report is not only to show the history of the movement of the notice. The importance lies furthermore in the fact that it is proof of what ultimately happened to the notice or any registered item. It has provision for comments by the Post Office that receives the notice or registered item. Such comments, if correct, provide sufficient proof of the destiny of the notice. It is therefore imperative that the comments of the Post Office be

recorded on that document so as to make it clear, without any extraneous evidence, what happened to the notice.

[11] That the said notice reached the appropriate branch of the Defendant's Post Office for delivery to the Defendant is not in dispute. Up to this point, the Plaintiff had complied with the law as set out in **paragraph 87 at page 168 of Sebola and Another v Standard Bank of South Africa Ltd 2012 (5) SA 142 CC.** In the said paragraph the Court had the following to say:

"To sum up: 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 'deliver', 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 dispatch 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 a sufficient proof of delivery."

I am satisfied, therefore, that with regard to the notice in terms of s 129, the Plaintiff has satisfied the requirements of Sebola in all respects.

[12] Even if the Plaintiff has, in my view, satisfied the law as set out in Sebola, the Plaintiff's delivery of the said s 129 notice seems to be beset by two problems, one of which is purely a mistake by the Post Office at Riverside, which cannot be attributed to the Plaintiff and the second one by operation of the law as set out in Kubyana, especially paragraph 54(b) thereof.

THE TRACK AND TRACE REPORT

[13] I have already pointed out somewhere *supra* the crucial role that the Track and Trace Report plays in the Plaintiff's steps to enforce the terms of an agreement made under the provisions of the NCA. The appropriate comments on the Track and Trace Report provide the necessary proof

that the consumer was made aware that there was an item available for him at the relevant branch of the Post Office. These necessary comments are conclusive and under normal circumstances are accepted by the Court without question that the necessary notice has reached the consumer. In the absence of such comments there can never be conclusive proof unless other evidence can be adduced or placed before the Court to prove that the s 129 notice reached the consumer. The fact that the notice in terms of s 129 reached the consumer must appear *ex facie* the Track and Trace Report. Where the comments on the Track and Trace Report are not helpful in that they lack the necessary information to satisfy the credit provider and the Court ultimately that the notice has reached the consumer, evidence by way of an affidavit of someone from the Post Office who dealt directly with the relevant item should satisfy the Court that the notice was given to the consumer will suffice. Secondly, a copy of the original notification that was sent to the consumer to notify him that an item awaits him at the Post Office will be sufficient. Such notification will, in the first place, show the item number, the date on which it was sent to the consumer, the names of the consumer and finally the address to which such a notification was sent. This information should, in lieu of the necessary comments of the Track and Trace Report, assist both the credit provider and the Court to establish that the s 129 notice came to the attention of the consumer.

[14] The biggest problem with the Track and Trace Report in this current matter is that nowhere does it state that the Defendant was notified that there was an item available for his collection at the Riverside Post Office. According to this Track and Trace Report it is inevitable to conclude that, in the absence of the necessary comments to the contrary, the Defendant in this case was never notified by the Riverside Post Office that he should come and collect the item at that particular branch of the Post Office.

[15] Ms Fisher-Klein was aware that the Track and Trace Report did not contain the necessary comments to indicate that the s 129 notice or an item was available for collection by the Defendant at the Post Office. In an effort to prove that indeed the Defendant was notified of an item that was available for his collection at the relevant Post Office, she referred to a supplementary affidavit by one Adinda Roets–Botha, a female attorney employed at the Plaintiff's Pretoria attorneys' offices. In the said affidavit the said Ms Roets-Botha had stated in paragraph 3 thereof that:

"I confirm that I contacted the Customer Care for the South African Post Office requesting information pertaining to the Riverside Post Office on 5 July 2017. I confirm that I spoke to Tshepo Mampone, an employee at the Post Office. Tshepo Mampone confirmed that the first notification was given on 10 March 2017 for the tracking number RC177831492ZA which was forwarded by way of registered post to the Defendant, informing the defendant to collect the registered item from their offices."

Mr Spiller argued, and in my view quite correctly so, that the said paragraph 3 consists of inadmissible hearsay evidence. He developed his argument and contended that the Plaintiff should instead have obtained the affidavit of the employee of the Post Office referred to in paragraph 3 of the said affidavit, that is Mr Tshepo Mampone. I agree with him. I have already, somewhere supra, indicated the crucial rule that such an affidavit would have played in this matter.

THE KUBYANA MATTER

[16] The second problem that confronted the Plaintiff on whether there has been compliance with the provisions of the s 129 notice was the law as set out in Kubyana. In paragraph 54(b) of Kubyana's judgment, the Court went further and Sebola when it stated that:

"CONCLUSION; PROOF OF DELIVERY OF S 129 NOTICE

[54] The Act prescribes obligations that Credit Providers must discharge in order to bring section S 129 notices to the attention of the consumers. When delivery occurs through the Post Office, proof that these obligations have been discharged entails proof that -

(a) the s 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;

(b) the Post Office issued a notification to the consumer that a registered item was available for her collection;

(c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in paragraph [52] above; and

(d) a reasonable consumer would have collected the s 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a) – (c), which reference may, again, be rebutted by a contrary indication; an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer."

According to Kubyana the duty is on the credit provider not only to prove that the s 129 notice reaches the consumer's appropriate branch of the Post Office but also to make sure that the Post Office issued notification to the consumer that a registered item is available for his or her or its collection at the Post Office. The duty is therefore on the credit provider to peruse the comments on the track and trace report to make sure that they indicate conclusively that notification was sent to the consumer. In conclusion, the credit provider will have satisfied the requirements of the s 129 notice if he can produce a copy of the track and trace report of the relevant branch of the Post Office and if the Post Office comments show that it had sent a

notification to the addressee that an item was lying at the Post Office available for his collection. Absent such comments the credit provider can rely on other evidence to prove that the Post Office notified the consumer of an item available for his collection lying at the Post Office as set out in paragraph 13 *supra*.

[17] In conclusion I find that there is no evidence on record or before this Court that there has been compliance by the Plaintiff with the s 129 notice of the NCA. It is trite that delivery to the consumer, in the instant case the Defendant, of the notice in terms of the said section is a mandatory statutory procedure that must be complied with before the credit provider, in this current matter the Plaintiff, can sue upon a credit agreement. In other words, proper compliance with the provisions of the s 129 notice of the NCA constitutes a fundamental pre-condition to any action predicated on the credit agreement. In this regard see **Nedbank Ltd and Others v National Credit Regulator 2011(3) SA 581 SCA.** In the said authority the Court had the following to say at paragraph 8 page 586:

"8. Despite the use of the word "may" in s 129(1)(a) the notice referred to therein is indeed a mandatory requirement prior to litigation to enforce a credit agreement."

See also **Absa Bank Ltd v De Villiers and Another 2009(5) SA 40(C) paragraph 14.**

[18] Counsel for the Plaintiff argued that in the considering the application for rescission, the Court should take into account whether or not the Defendant has a *bona fide* defence. The *bona fide* defence should relate to the merits of the main action. That the Defendant has no merits at all, is not in dispute. The Defendant had defaulted with the terms of the Agreement. Consequently, the Plaintiff was entitled to proceed with the action based on his default and furthermore based on the provisions of the NCA. On the other hand, counsel for the Defendant argued that non-compliance with the mandatory provisions of s 129 of the NCA constitutes an absolute defence to the Plaintiff's claim. When the requirements of s 129 of the NCA have not been complied with, it is irrelevant whether the Defendant has a *bona fide* defence or not. Failure to comply with the requirements of s 129 is in

itself, and this was the submission made by counsel for the Defendant, sufficient to ground an application for rescission of any default judgment without any further reference to whether or not the Defendant has a *bona fide* defence. This is so because if the Court refuses to set aside such a default judgment, then it confirms and perpetuates an illegality. I therefore conclude that in an application for rescission of a default judgment brought on the ground of non-compliance with the provisions of s 129 of the NCA it is not open for the Court to insist on the Defendant satisfying it that it has a *bona fide* defence against the Plaintiff's claim. It is not necessary, in other words, that the applicant in such a case should satisfy the Court that he or she or it has a *bona fide* defence to the Plaintiff's claim. Mere non-compliance with the requirements of the said s 129 constitutes in its own a ground upon which, without even referring to the nature of the Defendant's defence, a default judgment should be granted.

[19] The South African consumer laws are all geared up to protect consumers against unscrupulous credit providers and against unfair conduct by credit providers. Their purpose is to provide for a consistent and harmonised system of debt collection, debt restructuring, enforcement and judgment which places priority on the eventual satisfaction of all responsible consumer obligations and the credit agreement.

[20] Even when the consumer is in default of the terms of an agreement which is subject to the provisions of the NCA, the purpose of the NCA is to propose that the consumer should refer the credit agreement to a Debt Counsellor, alternatively a Dispute Resolution Agent, Consumer Court or Ombudsman with the proper jurisdiction. The aim is that the parties should resolve any dispute or problem emanating from such an agreement or develop and agree to a plan to bring the payments under the agreement up to date. The consumer will not be able to do any of those things mentioned above if he or she or it does not receive the notice in terms of s 129 of the NCA. The Plaintiff may also not commence litigation to enforce compliance with the terms of the credit agreement, unless

he or she or it has satisfied himself or herself or itself that the defendant or consumer has received or should have received the said notice in terms of s 129.

[21] I have pointed out that the Defendant also seeks condonation of the late filing of the application for rescission. To deny him the said relief will be to entrench an irregularity. Therefore, it is only fair and proper that the relief be granted. It has to be added, though, that both counsel did not pay much attention in their arguments to this relief. In the premises the application for condonation should be granted if denying it will result in this Court condoning non-compliance with the provisions of the law.

[22] Finally, there was an issue that the Defendant had telephonically advised the Plaintiff about his new address, in other words, that the Defendant has changed his address and notified the Plaintiff accordingly. Informing the Plaintiff telephonically of any change of address is invalid and not sufficient. It is also contrary to the parties' agreement. The Plaintiff is not bound by such telephonic change of address. It is entitled to send notices to the address that appears in the agreement as *domicilium citandi et executandi*, until the Defendant notifies the Plaintiff of his change of address in accordance with the terms of the Instalment Sale Agreement.

COSTS

[23] The Defendant seeks costs on attorney and client scale against the Plaintiff. The reason for doing so is that the Plaintiff was warned in the letter dated 13 October 2017 as follows:

> *"(c) There is also ample case law, particularly from the bench of the Constitutional Court, which speaks to the manner in which notices should be given to the consumers of their default and their rights and obligations as a result. It is clear that the trend is to take all reasonable steps available to draw such notice to a consumer's attention;*
>
> *(d) With respect, the Track and Trace Report at "G" of your client's particulars of claim does not indicate that notification of the notice was sent to our client on 10 March 2017, or any time*

thereafter. Instead, it shows that the notice was returned to the sender, without notification having been sent, and has, to date, not been collected;

(e) Furthermore, there is no evidence that your client took any other steps to bring the notice to our client's attention, despite the fact that your client is aware of our client's list of contact details, including his email address and telephone number;

(f) It is trite that any action implemented before the provisions of the National Credit Act 34 of 2005 ("the Act") (or any other legislation to that matter) have been met, would render such action premature, as is our submission in casu;

(g) Our client was entitled to the opportunity, before the debt could be recovered by way of legal action, to embark on the process to seek debt counselling or alternative dispute resolution as envisaged by the Act, and would, had he received such notice, have exercised his rights to do so."

The said letter continued as follows in the following paragraphs:

"3. As you are aware, it is the tendency of the Court to grant a Defendant with a bona fide defence, much like our client's defence in casu, the opportunity to have its version properly ventilated before the Court.

4. Given that our client is confident in his prospects of success in respect of application for rescission, both parties are then faced with the cumbersome task of seeing the matter to trial.

5. We needn't point out the exorbitant costs involved in opposed litigation of this nature, both in the application for rescission and the trial itself, which far outweigh any benefit to either of the parties should the matter proceed."

[24] If the Plaintiff had given earnest consideration to the said letter, in particular its contents, and the warning that such letter contained, it would have launched an investigation into the faulty Track and Trace Report and, if it was confirmed that it lacked the necessary details, would have ensured that it obtained the correct report or would have decided to abandon the judgment and issue the notice afresh. It would have saved costs in that manner. The Plaintiff's failure to take steps to verify the

Defendant's claims as contained in the said letter emboldened the Plaintiff's decision, unnecessarily so, to oppose the application for rescission. The Plaintiff simply adopted a supine attitude towards the warning contained in the said letter and treated such the warning with disdain. In the premises I agree with the counsel for the Defendant that an award of costs against the Plaintiff on a scale as between attorney and client is justified.

[25] The following order is accordingly made:

1. The application is granted.
2. The Defendant's late filing of this application for rescission is hereby condoned.
3. The application for rescission is hereby granted.
4. The Plaintiff is hereby ordered to pay the costs of opposing the Defendant's application for rescission on attorney and client scale.

PM MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	*Adv. LM Spiller*
Instructed by:	*Christo Smith Attorneys*
Counsel for the Respondent:	*Adv. SF Fisher-Klein*
Instructed by:	*Velile Tinto and Associates Inc, c/o KT Mokoena Inc*
Date heard:	*28 May 2018*
Date of Judgment:	*31 May 2018*