



NORTH WEST HIGH COURT, MAFIKENG

CASE NO. 1691/2012

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

PLAINTIFF

and

PAUL JOSEPH JACOBUS BADENHORST

DEFENDANT

JUDGMENT

GUTTA J.

A. INTRODUCTION

[1] This is an application for summary judgment arising from two claims:

- 1.1 claim A is for payment in the amount of R132 267.95 plus interest on the said amount at the rate of 15% per annum from 23 August 2012 to date of payment and costs;

- 1.2 claim B is for payment in the amount of R132 969.83 plus interest at the rate of 9.5% per annum from 25 August 2012 to date of payment and costs.

PLAINTIFF'S CASE

B. PLEADINGS AND SUBMISSIONS

- [2] In claim A, the plaintiff alleged that he concluded a written agreement with the defendant in terms of which the defendant was granted a current account and an overdraft facility on the account which was repayable upon demand. As at 12 September 2012, the defendant was indebted to the plaintiff in the sum of R132 267.05.
- [3] In terms of claim B, the plaintiff alleged that the defendant concluded a written facility loan agreement with the plaintiff. The defendant failed to pay the interests on the due date and is indebted to the plaintiff in the amount of R132 969.83.
- [4] The plaintiff alleged that it complied with the provisions of the National Credit Act ("the Act"), and the section 129 notice was dispatched on 21 September 2012 to the defendant who failed to respond to the said notice. The matter is not pending before a tribunal, debt counsellor, consumer court and/or ombudsman.

C. POINT IN LIMINE

- [5] The defendant in his affidavit opposing summary judgment raised a point *in limine* that the plaintiff failed to comply with the provisions of the Act.
- [6] Mr Smit, counsel for the defendant, submitted that the registered letter was dispatched to Plot 1 Lanric, while the address chosen by the defendant is Ballingee Plot 1. That the defendant is residing at the farm Ballingee situated on the Zeerust, Lobatse road, Mahikeng and the farm Lanric is on the Mahikeng, Zeerust road.
- [7] It was further alleged in the defendant's opposing affidavit that the defendant gave his postal address as the address at which he will receive notices and this postal address appears in the written loan agreement. That the plaintiff, instead of using the postal address on the section 129 letter, sent the letter to a farm, and it is common knowledge that the post office does not deliver letters at farm addresses, which is the address.
- [8] Counsel for the plaintiff submitted that there was compliance with the Act in that the defendant provided both his residential and postal addresses in the documents and there was no reason for the plaintiff to send the documents to the postal address.

[9] Clause 9 of Annexure D, the personal loan application and agreement, reads:

"9.3 I accept that the residential street address as given above (1.3) is the address to which documents in any legal proceedings against me may be served.

9.4 I accept that the postal address as given above (1.4) is the address to which notices may be delivered, and I accept that all letters and notices posted to me by the Bank by registered post will be regarded as having reached me within 14 days after posting."

[10] Hence, it is common cause that the defendant chose his residential address as the address where all documents in any legal proceedings should be delivered and that the section 129 notice was sent by registered post to the defendant at the physical address provided by the defendant. The registered item notification slip is attached as proof of postage. Further, a track and trace report is attached as proof of delivery to the relevant post office.

[11] The name 'Lanric' only appears in the plaintiff's particulars of claim, where the defendant's registered address is described as Plot 1–Lanric Plot, Ballingee, Mafikeng, and the summons was delivered to the defendant by personal service at Plot 1–Lanric Plot, Ballingee, Mafikeng.

[12] On perusal of the documents filed of record, it is apparent from the written loan agreement and supporting documents that the defendant's residential address appears as Ballingee Plot 1 and his postal address appears as P.O Box 3180, Mafikeng. There is no reference to the plot called Lanric.

[13] The Constitutional Court in *Sebola & Another v Standard Bank of SA Limited & Another* **2012 (5) SA 142 (CC)** held *inter alia* that the credit provider must take all reasonable steps to ensure that the notice reached the consumer or came to the attention of the consumer. It was further held that it is not sufficient for the bank to allege and provide proof that the notice had been sent by registered post to the address chosen by the consumer, and emphasised that “mere dispatch” is not enough and that at the very least the bank must obtain a “track and trace” printout from the post office to show that the notice was delivered to the relevant post office.

[14] In *Muien v BMW Financial Services (SA) (Pty) Ltd & Another* **2010 (1) SA 549 (KZN)** Wallis J (as he then was) **at paragraphs [14] and [18] at 556E–D and 557B–D** held that:

“The credit provider discharges its obligation of delivering notice by sending it to the postal address selected by the consumer.”

“Although the onus of proving that notice was indeed given rests on the credit provider, the risk of non-receipt of the notice lies with the consumer: provided the credit provider delivered the notice in the manner chosen by the consumer, and such manner was one specified in Section 65(2)(a), it is irrelevant whether the notice in fact came to the attention of the consumer.”

[15] Hence, the first question that arises is whether the plaintiff discharged the onus of proving that the notice was sent to the address selected by the defendant. As stated *supra*, the defendant chose his residential address for all legal notices, hence there was no obligation on the plaintiff to send the notice to the defendant's postal address.

- [16] As stated *supra*, the chosen address is Plot 1 Ballingee. This address is repeated on several pages in the document and the name Lanric Plot is absent. Hence, it cannot be said that the notice was delivered to the address selected by the defendant. Furthermore, even though the Sheriff's return is one of personal service at Plot 1–Lanric Plot, Ballingee, the defendant avers that Lanric Plot is on the Mahikeng–Zeerust road and not on the Zeerust–Lobatse road, where he resides.
- [17] For this reason, I accept the defendant's explanation that the notice was not delivered to him at his chosen addresses.
- [18] Furthermore, the Constitutional Court in *Sebola & Another v Standard Bank of SA Limited & Another supra*, held that the credit provider must take all reasonable steps to ensure that the notice reached the consumer or came to his attention. Accordingly, I am of the view that the plaintiff failed to discharge its obligation of delivering the notice to the defendant.
- [19] Other courts have in fact gone one step further to state that the notice should, as a precautionary measure, also be sent to the defendant at the postal address provided. See *ABSA Bank Limited v Mkhize & Another 2012 (5) SA 574 (KZD)*; *Balkind v ABSA Bank, In re ABSA Bank Limited v Llifu Trading 172 CC & Others (29/2012) [2012] ZAECHC 102 (12 December 2012)*.

- [20] There is some doubt whether there are two addresses, one Lanric Plot, another Ballingee or whether they are one and the same address, and whether the Sheriff served the summons on the defendant at Ballingee and included the name Lanric because it appears together in the particulars of claim.
- [21] The Court cannot be called upon to make any assumption regarding the defendant's conduct, had the section 129 letter been delivered to the address chosen by the defendant. I cannot, however, ignore the defendant's rights to exercise the option advanced in the section 129 letter.
- [22] Accordingly, the point *in limine* raised by the defendant is upheld.
- [23] In the light of the foregoing, it is not necessary for this Court to consider the defence raised by the defendant in respect of claim A and claim B, save to state that the defences raised were in my view not convincing or persuasive.

C. ORDER

- [24] Accordingly, I make the following order:
- a) The defendant's point *in limine* is upheld.
 - b) The defendant is granted leave to defend the action.

- c) The plaintiff is to comply with section 129 of the National Credit Act.
- d) Costs are to be costs in the application.

N. GUTTA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 18 APRIL 2013
DATE OF JUDGMENT : 02 MAY 2013

COUNSEL FOR PLAINTIFF : ADV H.J. SCHOLTZ
COUNSEL FOR DEFENDANT : ADV P. SMIT

ATTORNEYS FOR PLAINTIFF : D C KRUGER ATTORNEYS
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ATTORNEYS FOR DEFENDANT : HERMAN SCHOLTZ ATTORNEYS