IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no.: 3639/17

Date heard: 26 June 2018
Date delivered: 31 July 2018

In the matter between:

FIRSTRAND BANK LTD t/a WESBANK
t/a GMSA FINANCIAL SERVICES **Applicant/Plaintiff**

and

SIPHIWO CLIFFORD CAGA **Respondent/Defendant**

JUDGMENT

BENEKE, A.J.

[1] This is an opposed application for summary judgment wherein the applicant seeks cancellation of a credit agreement, return of a certain motor vehicle, and costs. The respondent opposes the application on the sole ground that the statutory notice of default was insufficient and ineffective.

[2] In terms of the credit agreement entered into between the parties, both the *domicilium* and the postal addresses of the respondent were indicated as "*Gaga Location, Alice, 5700*". According to the particulars of claim and the attachments thereto, the notice in terms of section 129 of the National Credit Act 34 of 2005 ("the Act") was sent twice to the respondent: once to the indicated *domicilium*

address and once to "*PO Box […], Alice, 5700*". The track and trace report in respect of the attempt at the *domicilium* address reveals that the notice had reached the post offices and the first notification had been sent to the respondent. There is no track and trace report in respect of the letter sent to the post office box.

[3] Mr Knott, who appeared for the respondent, contended that the *domicilium* address was too vague to constitute proper service of the notice. He further contended that there was no evidence of a connection between the respondent and the post office box to which the second letter had been addressed. Mr Barker, on behalf of the applicant, contended that the applicant had complied with the Act as it had sent the notice to the address chosen by the respondent and that the respondent must stand and fall by the address he had chosen.

[4] Delivery of the notice to the post office box was superfluous to the requirements of the Act. I also find that there is no evidence before me of a connection between the respondent and that particular post office box. This can therefore not constitute proper notice as required by the Act.

[5] I turn to consider the notice sent to the *domicilium* address. Section 129(1)(b)(i) of the Act provides that the applicant may not commence any legal proceedings to enforce the credit agreement before first providing notice to the respondent of his default and seeking to resolve the matter out of court. Section 130(1)(a) provides that this notice must be "*delivered*" to the respondent. Section 129 goes on to provide for exactly how such delivery should be effected:

"*(5) The notice contemplated in subsection (1) (a) must be delivered to the consumer—*
(a) by registered mail; or
(b) to an adult person at the location designated by the consumer.
[Sub-s. (5) added by s. 32 (c) of Act No. 19 of 2014.]
(6) ***The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5)****.*
[Sub-s. (6) added by s. 32 (c) of Act No. 19 of 2014.]
(7) Proof of delivery contemplated in subsection (5) is satisfied by—

(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or

(b) the signature or identifying mark of the recipient contemplated in subsection (5) (b).

[Sub-s. (7) added by s. 32 (c) of Act No. 19 of 2014.]" [My own emphasis]

[6] Since it appears to be the responsibility of the respondent to select his *domicilium* address, it is therefore perfectly reasonable that he carry the risk of the notices going astray. In this regard see *Rossouw and Another v Firstrand Bank* 2010 (6) SA 439 (SCA) at par [29] and *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1 at par [32].

[7] In *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) at par [75] it was held that the respondent will carry the risk of the non-delivery of the notices if the applicant has provided proof that the notice was delivered to the correct post office. This has been done.

[8] In *Sebola*, it was also held, at par [77], that:

"[c]*oupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed in the absence of contrary indication and the credit provider may credibly aver, that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office.*"

No contrary indication was provided on affidavit by the respondent.

[9] In *Kubyana*, at paras [32] and [36], it was held that if the applicant has complied with the requirements of (a) respecting the respondent's election; (*b*) undertaking the additional expense of sending notices by way of registered mail rather than ordinary mail; and (*c*) ensuring that any notice is sent to the correct branch of the Post Office for the respondent's collection, "*it will be up to the* [respondent] *to show that the notice did not come to her attention and the reasons why it did not*". The respondent has failed to do so on affidavit.

[10] It may well be that the respondent is well known in Alice and the address provided as his *domicilium* would be sufficient to allow for proper service of the notice. Even

if this amounts to conjecture, I must find, absent any evidence to the contrary, that the respondent was certainly of the view that the address he provided was sufficient for the notice to reach him. Further, in the absence of any evidence to the contrary, I must accept that the proper first notification of the registered letter was sent to the respondent.

[11] Nothing more can be expected of the applicant than what it has done. The failure of the notice to reach the respondent must be attested to on affidavit. This was not done. In the absence of more evidence on the part of the respondent, the applicant has met the requirements of the Act.

[12] As no further defences were raised by the respondent, I must find for the applicant.

[13] I, therefore, make the following order:

1. The credit agreement entered into between the parties on 16 September 2015 is cancelled;

2. The respondent shall return to the applicant the 2015 Isuzu KB 300 D-TEQ LX 4x4 P/U D/C motor vehicle with engine number 4JJ1MD5646 and chassis number ADMUSCER8C4706752 within 14 days of the date of the order herein; and

3. The respondent shall pay the costs of suit, including the costs of the opposed application for summary judgment.

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M BENEKE
JUDGE OF THE HIGH COURT (ACTING)

Appearances: For the Applicant: Mr Barker
On the instructions of Huxtable Attorneys

For the Respondent: Mr Knott
On the instructions of Neville Borman and Botha