



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A5041/2010

(1)	REPORTABLE <u>NO</u> / YES
(2)	OF INTEREST TO OTHER JUDGES <u>NO</u> / YES
(3)	REVISED.
DATE	SIGNATURE
11-8-2011	<i>[Signature]</i>

In the matter between -

MASHILO SHADRACK SEBOLA

1st Appellant

NOMBEKO DAPHNE SEBOLA

2nd Appellant

and

THE STANDARD BANK OF SOUTH AFRICA

1st Respondent

THE DEPUTY SHERIFF OF THE HIGH
COURT, ROODEPOORT - FWJ CORTZEE

2nd Respondent

J U D G M E N T

BORUCHOWITZ, J:

[1] The appellants applied to rescind a default judgment granted against them in favour of the first respondent on 25 September 2009, and to have a

writ of attachment that was issued pursuant to such judgment set aside. The application was dismissed by Blleden J and the present appeal is against that order.

[2] The first respondent's action against the appellants was based on a mortgage bond entered into by the appellants in favour of the first respondent on 30 November 2007 in the amount of R1 050 000.00 as security for moneys lent and advanced by the first respondent to the appellants. The appellants conceded that they had failed to comply with their obligations in terms of the mortgage bond in that they failed to make payment in terms thereof.

[3] The only defence persisted in by the appellants was that the first respondent had failed to comply with the debt enforcement procedures provided for in ss 129 and 130 of the National Credit Act, 34 of 2005 (the Act).

[4] The first respondent is a credit provider, the appellants are consumers and the mortgage bond is a credit agreement and consequently certain of the provisions of the Act are applicable.

[5] The relevant parts of s 129 read:

"129 Required procedures before debt enforcement

(1) If the consumer is in default under a 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 intent 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."

[6] Section 130(1) read as follows:

"(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

- (a) at least 10 business days have elapsed since the credit agreement delivered a notice to the consumer as contemplated in ... section 129(1) ...;
- (b) in the case of a notice contemplated in section 129(1), the consumer has –
 - (i) not responded to that notice; or
 - (ii) responded to the notice by rejecting the credit provider's proposals. ..."

[7] It is not disputed that prior to commencing the application the first respondent had sent the requisite notice by registered post to the address chosen as the address for service by the appellants in the mortgage bond but, for reasons beyond the control of the appellants, was not received or did not reach the attention of the appellants.

[8] The principal question in this appeal is whether the mere sending of the notice by the first respondent by registered post to the address chosen in the mortgage bond constitutes compliance with the provisions of the Act. The court *a quo* was satisfied that it was not a requirement that the notice in fact come to the attention of the consumer, and held that the provisions of the Act had been complied with. The learned Judge noted that there were divergent decisions in various courts in relation to this issue and for that reason granted leave to appeal to the Full Bench of this Division. These decisions include: *Absa Bank Limited v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) and *First Rand Bank Limited v Dhlamini* 2010 (4) SA 531 (GNP); *Munion v BMW Financial Services SA (Pty) Limited and Another* 2010 (1) SA 549 (KZD); *Standard Bank of South Africa Limited v Rockhill and Another* 2010 (5) SA 252 (GSJ) and *Starita v ABSA Bank Limited and Another* 2010 (3) SA 443 (GSJ).

[9] The question at issue has been authoritatively settled. In *Rossouw and Another v First Rand Bank Limited* 2010 (6) SA 439 the Supreme Court of Appeal held, after a review of the aforementioned relevant legislative provisions, including ss 65 and 96 of the Act, that it is sufficient to establish compliance if there is delivery of the notice in the manner chosen by the consumer, and that actual receipt is the consumer's responsibility. Maya JA, writing for the Court, stated the following at para [32]:

"It appears to me that the legislature's grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place

the risk of non-receipt on the consumer's shoulders. With every choice lies a responsibility, and it is after all within a consumer's sole knowledge as to which means of communication will reasonably ensure delivery to him. It is entirely fair in the circumstances to conclude from the legislature's express language in s 65(2) that it considered despatch of a notice in the manner chosen by the appellants in this matter sufficient for purposes of s 129(1)(a), and that actual receipt is the consumer's responsibility."

[10] It was also held that s 130(2) of the Act does not apply to mortgage loans (see paras 16-19 and 41-42 of the judgment).

[11] The appellants, who appeared in person, sought to advance various reasons as to why Rossouw had been incorrectly decided. It was argued, among other things, that the Supreme Court of Appeal had applied incorrect interpretive principles and did not have regard to certain relevant provisions of the Constitution. As Rossouw is a decision of the Supreme Court of Appeal, this Court cannot depart therefrom and is bound thereby.

[12] In the result the appeal falls to be dismissed.

[13] The following order is granted:

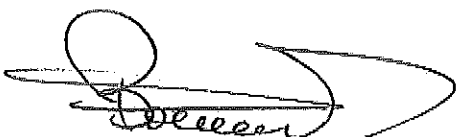
The appeal is dismissed with costs.



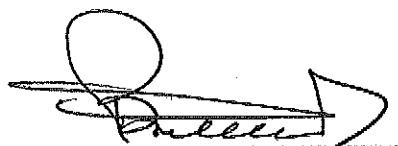
P BORUCHOWITZ
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

/ I agree ...

I agree:


 by **R MOKGOATLHENG**
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:


 by **P COPPIN**
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

THE APPELLANTS APPEARED IN PERSON

APPELLANTS' ATTORNEYS

JC MARIBANA & ASSOCIATES
 ATTORNEYS

COUNSEL FOR
 FIRST RESPONDENT

ADVOCATE M G REBELO

INSTRUCTED BY

KEVIN MOODLEY & ASSOCIATES