

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 32847/2012

- (1) REPORTABLE: **Yes.**
(2) OF INTEREST TO OTHER JUDGES: **Yes.**
(3) REVISED.

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DATE

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SIGNATURE

In the matter between

**STANDARD BANK OF SOUTH AFRICA LTD
AND SEVERAL OTHER MATTERS**

APPLICANTS

and

VAN VUUREN, JG AND SEVERAL OTHER MATTERS

RESPONDENTS

J U D G M E N T

SUMMARY:

Positive indications that a consumer did not receive a notice pursuant to section 129 of the National Credit Act 35 of 2005 - requirements of delivery of notice not satisfied. Proof that a notice in terms of section 129 of the National Credit Act 35 of 2005 was dispatched to consumer's correct post office may supplied by an employee of post office by way of letter – letter sufficient to supplement track and trace report.

WEPENER J:

[1] There served a number of applications before this court for default judgment in respect of home loans where the applicants seek foreclosure and execution regarding properties over which mortgage bonds were passed in favour of the applicants over such properties, which all appeared to be the primary homes of the respondents.

[2] In each instance it is common cause that a notice pursuant to s 129 (1) of the National Credit Act 34 of 2005 (the NCA) (s 129 notices) had to be given to the respondent. In each of the matters before me such notices were indeed posted. In *Sebola and another v Standard Bank of South Africa Ltd and another* 2012 (5) SA 142 (CC) Cameron J said at para 75 -78:

[75] Hence, where the notice is posted, mere despatch is not enough. This is because the risk of non-delivery by ordinary mail is too great. Registered mail is in my view essential. Even though registered letters may go astray, at least there is a "high degree of probability that most of them are delivered". But the mishap that afflicted the Sebolas' notice shows that proof of registered despatch by itself is not enough. 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 s 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.

[76] In practical terms this means the credit provider must obtain a post-despatch "track and trace" print-out from the website of the South African Post Office. As BASA's submission explained, the "track and trace" service enables a despatcher who has sent a notice by registered mail to identify the post office at which it arrives from the Post Office website. This can be done quickly and easily. The registered item's number is entered, the location of the item appears, and it can be printed.

[77] The credit provider's summons or particulars of claim should allege that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection. Coupled 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.

[78] The evidence required will ordinarily constitute adequate proof of delivery of the s 129 notice in terms of s 130. Where the credit provider seeks default judgment, the consumer's lack of opposition will entitle the court from

which enforcement is sought to conclude that the credit provider's averment that the notice reached the consumer is not contested.'

[3] There are two questions that need to be resolved. Firstly, whether there was compliance with s 129 (1) of the NCA despite the fact that the 'track and trace' report indicates that the notice did, for some or other reason, not reach the judgment debtor *inter alia*, as a result of the fact that it was returned to sender. The second question is how to deal with the difference in the address to which the notice was sent and the name of the post office on the 'track and trace' report.

[4] In regard to the first question there are two conflicting judgments. The first being *Nedbank Ltd v Binneman and 12 similar cases* [2012] ZAWCHC 141 (21 June 2012) and the second being *ABSA Bank Ltd v Mkhize and Another, ABSA Bank Ltd v Chetty, ABSA Bank Ltd v Mlipha* (4084/2012, 4115/2012, 3882/2012) [2012] ZAKZDHC 38 (6 July 2012).

[5] I am persuaded that the judgment in *Mkhize* correctly interprets the judgment of the Constitutional Court in *Sebola*, particularly if regard is had to the minority judgment in *Sebola*, which concluded that actual service of the notice on a judgment debtor was required.

[6] I, consequently, concur with the judgment in *Mkhize* given by Van Olsen AJ that, when there are indications contrary to the requirements regarding the s 129 notice in *Sebola*, that a court cannot be satisfied that a notice probably reached the consumer (*Sebola* par 75), and such notices were not effective. The service of the notice in a manner which clearly indicates that the notice had not been collected at the post office but had been returned to sender, cannot suffice to satisfy the requirements set out in *Sebola* regarding the probability that the notice reached the consumer. In the

circumstances I am of the view that it cannot be contended that there was compliance with s 129 of the NCA if it is clear that the notice was returned to sender or for some other reason it is apparent that the consumer in fact did not receive the notice. I am in agreement with what was expressed with Van Olsen AJ in *Mkhize* at para 55 and 56 where it was said:

[55] In paragraph 74 of the judgment the court then reached the conclusion that an understanding of the meaning of the term “deliver” in section 130 must be found in a broader approach by determining what the credit provider should establish “by way of proof that the section 129 notice in fact reached the consumer”. In my view if one knows that “in fact” the section 129 letter did not reach the consumer then evidence which might have gone the other way in other circumstances becomes irrelevant, and the court in Sebola must have been alive to that. Indeed, at the end of paragraph 74 of the majority judgment it is stated that the point of the evidence is to “satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer”. It is impossible so to be satisfied if one knows that as a matter of fact the notice did not reach the consumer because it was returned to the credit provider.

[56] In that context what is conveyed in paragraph 77 of the majority judgment is clear enough. Coupled with the required allegations in the credit provider's summons, proof that the notice reached the correct post office brings about that “it may reasonably be assumed in the absence of contrary indication,.. that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office”. (My emphasis.)’

[7] In the circumstances in those matters where the notice was returned to sender or there were positive indications to controvert the assumption referred to in para 77 of the *Sebola* judgment, there have not been compliance with the provisions of s 129 of the NCA. Those matters were consequently adjourned pursuant to the provisions of s 130 (4)(b) of the NCA with appropriate orders as to steps that the applicants should take before the matters may be resumed. The steps so ordered to be taken are irrelevant for purposes of this judgment.

[8] I need not deal with this question further as I am assured that the *Mkhize* matter is to be dealt with by the Supreme Court of Appeal in due course.

[9] The second question is a factual one. The addresses chosen by the consumers often differ from that which appear on the 'track and trace' report as far as the relevant town, suburb or post office is concerned. As an example in the first matter now under consideration, the chosen address of the respondent is '*Plot 17, Tenandries, Randfontein, 1760*' to which the registered notice pursuant to s 129 of the NCA was forwarded.

[10] However, the 'track and trace' report shows that the document was delivered to the Randgate West post office. In another matter, for instance, the notice was sent to Vosloorus but landed up the Boksburg North post office. There are numerous such examples. This is so because the post office indicated on the 'track and trace' report is the post office that serves the particular address to which the notice was sent.

[11] In order to overcome this discrepancy Ms Fine, appearing for the applicants, handed up a letter on an official South African Post Office letterhead, signed by an accounts manager of the South African Post Office, in which he advised that after 24 years employment with the South African Post Office, he is fully conversant with the systems used by the South African Post Office regarding mail delivery in South Africa. He further states that '*I have accessed the systems and am accordingly able to confirm that the post office listed in the right hand column would have been responsible for the delivery of the item to the address listed in the left hand column*'. The right hand column refers to Randgate West and the left hand column '*Plot 17, Tenandries, Randfontein, 1760*'. He consequently sets out the local post office which serves the address to which the notice was sent. This explains and clears up any discrepancy that there may have existed and the post office reflected in that 'track and trace' report is indeed the post office serving the address to which the s 129 notice was sent.

[12] I have to decide if such letter is sufficient evidence for purposes of establishing that the 'track and trace' report indeed reflects the correct information. I am of the view that it is.

[13] The identification of the post office, serving the address where the s 129 notice was sent to can, in my view, sufficiently be proved by such an official letter issued by a responsible employee of the South African Post Office. I accordingly accept the letters handed up by Ms Fine in which the official of the South African Post Office identifies the post office at which the s 129 notice was delivered as the relevant post office that services the address of the consumer.

[14] The requirement of proof of service of notices has for many years been met by, what is essentially, hearsay evidence. Proof by way of registered slip that a document was sent is hearsay. Proof of a publication of a notice in newspaper is similarly hearsay. Indeed a sheriff's return of service is hearsay. The 'track and trace' report from the post office, downloaded from its website, is hearsay, yet courts have regarded these documents as sufficient to prove that publication or service had taken place.

[15] In addition, the Constitutional Court has recognised such evidence as sufficient to be placed before a court to satisfy the requirements of s 129 of the NCA.

[16] An official letter from the South African Post Office, confirming that a particular post office serves the consumer's address would, in my view, be supplementary to the 'track and trace' report obtained from the internet and I can see no reason why such a letter should not suffice to identify the relevant post office.

[17] I consequently allowed counsel to hand up a letter on an official letterhead of the South African Post Office to satisfy me that the name of the post office contained in the '*track and trace*' report is indeed the post office serving the address of the debtor to which the s 129 notice was sent.

[18] I, consequently, find that the applicant has sufficiently shown that the apparent discrepancy between the address to which the s 129 notice was sent and the post office reflected on the '*track and trace*' report is not significant and indeed that the s 129 notice was delivered to the correct post office.

[19] In the circumstances I grant the following order against the first respondent:

19.1 The sheriff of this court or his lawful deputy is authorised, directed and empowered, to attach, seize and hand over to the applicant the vehicle being a Ford Ranger 2500TD, Engine number WLAT759647 and Chassis number AFADXXMJ2D7K03279.

19.2 Costs of suit.

[20] The orders in each of the other matters are endorsed on their respective court files.

WL WEPENER
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANTS: *Adv Vanessa Fine*

APPLICANT'S ATTORNEYS: *Hammond Pole Attorneys*

DATE/S OF HEARING: *26 February 2013*

DATE OF JUDGMENT: *26 February 2013*