REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **14315/2015**

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

31/5/17
DATE

SIGNATURE

In the matter between:

Firstrand Bank Limited	Applicant
and	
Metiner, Eliran	First Respondent
Unit 112 Shingara Sands CC	Second Respondent

JUDGMENT

CORAM: DANIELS AJ:

[1] On 17 April 2015 the applicant launched an application in this court against the first and second respondents for a money judgment in the amount of R1 744

987.59, and interest and costs, against the first and second respondents jointly and severally.

[2] It also seeks relief against the first respondent directing that eight immovable properties situated in Industria township, in the scheme known as Midas Medical Centre, be specially executable.

[3] The first respondent is the sole member of the second respondent and duly authorised to oppose the application on behalf of the second respondent.

[4] There was no appearance for the respondents at the hearing. The respondents did not file a practice note or heads of argument. Only counsel for the applicant was present at the hearing.

[5] The claim against the first respondent is founded on a written credit agreement between the applicant and the first respondent and a sectional covering mortgage bond ("*the mortgage bond*") registered in favour of the applicant over each of the eight immovable properties.

[6] In terms of the credit agreement the applicant lent and advanced the amount of R2 160 000.00 to the first respondent.

[7] The material express terms of the credit agreement are:

1. The applicant agree to lend to the first respondent the sum of R2 160 000.00;

2. The aforesaid amount was payable by the first respondent to the applicant by way of 120 equal monthly repayments in the sum of R29 559.00 from 15 November 2011, calculated daily and capitalised monthly in arrears and

the debt would bear interest at a variable rate of interest linked to the applicant's prime rate plus 1.7% per annum.

3. In the event of the first respondent committing a breach of any of the terms and conditions of the credit agreement or in the event of the first respondent failing to pay punctually, any amount payable in terms of the credit agreement, the applicant would be entitled to claim immediate repayment of the outstanding balance and it would be entitled to apply for an order to have the mortgaged properties, referred to hereinafter, declared immediately executable.

[8] The mortgage bond was executed by the first respondent on the 25th of October 2011 in favour of the applicant.

[9] The material express terms of the mortgage bond were that:

1. The first respondent mortgaged each of the eight immovable properties as security for the amount of R2 160 000.00, being the capital amount;

2. The additional amount of R432 000.00 arising from and being advances, credits and other banking facilities granted by the applicant to the first respondent; and

3. The mortgage bond would be and remain in full force and effect as a continuing security and covering bond for each and every sum which the first respondent owed or hereinafter became indebted to the applicant from whatever cause arising notwithstanding any fluctuation in the amount or even temporary extension of such indebtedness until such time as the bond had been cancelled by consent of the applicant.

[10] It is common cause that the first respondent breached the terms of the credit agreement. The first respondent failed to pay the monthly instalments. At 18 March 2015 the first respondent was in arrears in the amount of R88 102.84. The balance outstanding at that time was R1 744 987.59.

[11] In addition the first respondent also did not pay the monthly rates and taxes due to the City of Johannesburg in respect of the mortgaged properties.

[12] The total amount of the arrears in respect of the rates and taxes for the eight properties amounted to R258 616.00 in the aggregate as at 17 February 2015.

[13] Although the first respondent disputes that he is in arrears in this regard, and states that he commenced a discussion with the City Council to have the issue regarding the rates and taxes sorted out, no further particularity has been provided by the first respondent regarding the alleged arrears. It is not known what progress has been made in this regard. The answering affidavit of the respondents was deposed to on the second of June 2015.

[14] The first respondent however admitted the arrears in respect of the credit agreement and the amount owing. The first respondent blames the non-payment of the instalments in respect of the credit agreement on an administrative error on his part. The first respondent has not provided any explanation of what he has done to remedy the administrative error or what the nature and cause of the administrative error was.

[15] Irrespective of the cause of the arrears, the first respondent has admitted that he is in arrears in respect of the monthly instalments of the credit agreement, and he does not dispute the amount owing.

[16] The first respondent says that had he received the applicant's letter of demand, he would have attended to resolve this matter sooner and would have arranged to pay these amounts.

[17] Despite the say so of the first respondent, it appears that no steps have been taken by the first respondent to pay the amounts and the amount owing as at the 18th of March 2015 remains outstanding.

[18] The demand which the first respondent refers to is a notice in terms of Section 129 of the National Credit Act, 34 of 2005 ("*the Act*"), which the applicant posted through its attorney of record to the first respondent at his address stated in the credit agreement, by registered mail.

[19] The applicant also forwarded a letter dated 10 March 2015 to the *domicilium* address of the first respondent by prepaid registered post. In this letter the applicant demanded in terms of clause 5.7.3.9 of the credit agreement that the first respondent furnish the applicant's attorney of record with proof that the arrear rates and taxes had been paid. The first respondent did not respond to this letter of demand.

[20] In its founding affidavit the applicant provided proof of posting of the letter of demand sent in terms of clause 5.7.3.9 of the credit agreement, relating to the arrear rates and taxes, and the notice in terms of Section 129 of the Act. Both of these documents were sent to the first respondent at 1 Kelvin Street, Industria, Johannesburg 2093. That address is reflected as the physical address of the first respondent on the first page of the credit agreement.

[21] In respect of both the letters the applicant provided proof that the letters were dispatched as "*registered letters*" to the first respondent at 1 Kelvin Street, Industria, Johannesburg 2093.

[22] The applicant also attached a document "*parcel tracking results*" to its founding affidavit, reflecting that on 4 March 2015 a first notification was sent to the "*recipient*", being the first respondent, that a registered item was available for collection at the Industria post office.

[23] Despite the despatch of the registered letters and delivery as stated, the first respondent failed to respond to the demand or the notice in terms of Section 129 of the Act within ten days from delivery or at all.

[24] On the 17th of April 2015, when this application was launched the first respondent was in default under the credit agreement for more than twenty days as contemplated in terms of Section 130(1) of the Credit Act.

[25] It is common cause that the second respondent bound itself in writing as surety and co-principal debtor with the first respondent for the due payment by the first respondent of all monies owing by the first respondent to the applicant from time to time.

[26] It is also common cause that the arrear amount owing by the second respondent, as surety, is the sum of R88 102.84, and that the total balance outstanding as at 18 March 2015 was R1 744 987.59.

[27] The applicant's attorney of record also forwarded a notice in terms of Section 129 of the Act to the second respondent on the 2nd of March 2015, by registered post. This notice was also duly delivered to the relevant post office, which in turn

forwarded the registered item notification slip to the second respondent advising it that a registered item was available for collection at the post office.

[28] As in the case of the notice in terms of Section 129 of the Act sent to the first respondent, the second respondent did not respond to the notice within ten days of delivery or at all.

[29] The second respondent was also in default of the credit agreement for at least twenty days at the time that the application was launched, as contemplated in terms of Section 130(1) of the Act.

[30] It is common cause that the eight properties in question are commercial properties.

[31] It is clear from the answering affidavit that neither of the respondents have any intention of relying on the remedies available to them under Section 129 of the Act. Irrespective of whether the respondents received the two notices in terms of Section 129 of the Act, they also received the notices as attachments to the founding affidavit of the applicant, to which the respondents filed an answering affidavit. Despite having received the notice of motion and answering affidavit and having deposed to an affidavit in response to the founding affidavit on the 2nd of June 2015, the respondents have made no effort to rely on the remedies available to them under Section 129 of the Act.

[32] The respondents have provided no explanation why the notices in terms of Section 129 of the Act were not received. The respondents have stated nothing more than that the two notices were not received.

[33] The fact that neither of the respondents actually received the notices in terms of Section 129 of the Act, which were sent by registered post, does not prevent the applicant from obtaining the relief it seeks in the notice of motion. In **Majola v Nitro Securitisation 1 (Pty) Ltd 2012 (1) SA 2261 SCA** the court held that:

> *"[19] The fact that he never received it does not render the notice invalid and the issue of the summons premature."*

[34] In the Majola matter the notice had been sent to a *domicilium* address by registered post. The consumer did not collect it.

[35] In the present matter the applicant complied in every material respect with the guidelines provided in the judgment of the Constitutional Court in **Sebola and Another v Standard Bank of South Africa Limited and Another, 2012 (5) SA 142.** The court considered a number of conflicting decisions in various divisions of the High Court, on the very question what constituted compliance with the notice requirement of Section 129(1)(b)(i) of the Act.

[36] Cameron J came to the conclusion, in balancing Section 129 and Section 130 of the Act, that:

1. where a notice is posted mere dispatch is not enough;
2. registered mail is essential;
3. reasonable measures have to be taken by the credit provider to bring the notice to the attention of the consumer;

4. information must be provided to the court that will satisfy the court that the notice has probably reached the consumer. This would require proof that the notice was delivered to the correct post office;

5. practically this would require that a "*track and trace*" printout from the office of the South African Post Office be provided to the court;

6. the credit provider would have to allege that the notice was delivered to the relevant post office, and that a "*notification slip*" had been delivered informing the consumer that a registered item was available for collection at the post office.

[37] In the event of judgment being sought by default, a consumer's lack of opposition would 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.

[38] Cameron J also held in the Sebola matter that:

> *"[79] If in contested proceedings the consumer asserts that the notice went astray after reaching the post office, or was not collected, or not attended once collected, the court must make a finding whether, despite the credit provider's proven efforts, the consumer's allegations are true, and, if so, adjourn the proceedings in terms of Section 130(4)(b)."*

[39] In this matter the respondents have only stated that the notices were not received. Significantly, it is only stated that the two notices in terms of Section 129 of the Act were not received. Nothing is said by the first respondent in this

regard about the initial demand by the applicant to provide proof of payment of the arrear rates and taxes.

[40] The applicant has provided all the required evidence to satisfy me that the notices were delivered at the required address, after having been sent by registered post. The documents evidencing the tracking results show that notification was sent to the respondents. That being so, one would expect something more from the respondents than the bold statement that the notices were not received.

[41] The respondents do not dispute that the notices were despatched by registered post, and that notification was received that the notices were at the post office. The respondents merely deny that the notices themselves were received. The process of delivery of the notices is not challenged at all. That being common cause, a mere bold denial that the notices were received is not enough to persuade me that the applicant did not comply with its obligation in terms of Section 129(1)(a) of the Act.

[42] It is only in the event of non-compliance with the relevant provisions of *inter alia* Section 129(1)(a) of the Act, that Section 130(4)(b) finds application.

[43] In the matter of **Kubyana v Standard Bank of South Africa Limited 2014 (3) SA 56** the Constitutional Court considered the steps that a credit provider must take in order to ensure that a notice of default reaches a consumer before it may commence litigation.

[44] The court found that a credit provider is not obliged to bring a Section 129 notice to the subjective attention of a consumer.

[45] Mr Kubyana, the applicant in the Constitution Court, alluded that the Sebola judgment meant that as soon as there is a "*contrary indication*" showing as a matter of fact that the Section 129 notice in terms of the Act did not come to the subjective attention of the consumer, that would should that the requirements of Section 129 of the Act had not been met.

[46] This argument was rejected by the court. It found that the contrary indication, which militates against an inference that a notice in terms of Section 129 of the Act reach the consumer, would be a "*.... factor showing that in the circumstances and despite the credit provider's efforts, the notification did not reach the consumer's designated address. A further factor would be one showing that the consumer acted reasonably in failing to collect or attend to the notice, despite the delivery of the notification to the address.*"

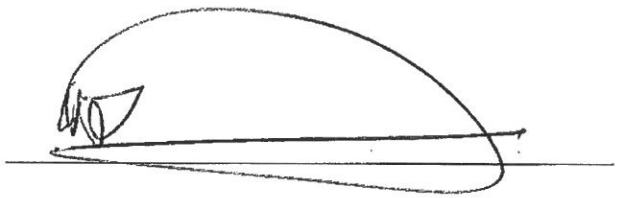
[47] I am satisfied that in this matter the evidential burden shifted to the respondents. Despite this, respondents provided no evidence why they, as reasonable consumers did not collect the registered item at the post office. The respondents also provided no evidence why they, despite the applicant having done all things necessary to have the notices delivered, did not receive the notices.

[48] In view of the bold statement that the two notices in terms of Section 129 of the Act were not received, it is not possible to determine the reasonableness of the conduct of the respondents.

[49] In the circumstances I am satisfied that the applicant complied with the requirements contained in Section 129 of the Act.

[50] It was entitled to launch the application for payment and to have the properties declared executable, when it did.

[51] In view of the debt and the breaches of the credit agreement and the mortgage bond being admitted, I grant an order in terms of prayers 1, 1.1, 1.2, 1.3, 2, 2.1 to 2.8 (inclusive) of the notice of motion dated 16 April 2015.



DANIELS AJ

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT	***FJ BECKER SC***
APPLICANT'S ATTORNEY	***SMIT JONES & PRATT***
NO APPEARANCE FOR THE RESPONDENTS	
DATE OF HEARING	***24 MAY 2017***
DATE OF JUDGMENT	***31 MAY 2017***