

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

CASE NO 24577/2009

In the matter of:

BMW FINANCIAL SERVICES (PTY) LTD

Applicant

and

INNA WELTMAN-SHMARYAHU

Respondent

JUDGMENT: 10 JUNE 2011

WEINKOVE, AJ

- [1] This is an application for the return of a motor vehicle which was sold by the applicant to the respondent in terms of an instalment credit agreement sale. Applicant is a financial services provider and is registered as a credit provider in terms of the National Credit Act.
- [2] The motor vehicle concerned was purchased during March 2008 and the respondent has been in arrears since March 2009. Applicant alleges the arrears now amount to the sum of R52 656.45.
- [3] In her affidavit of opposition respondent raises a number of defences only one of which was argued before me. The others were wisely abandoned.

- [4] In the first place she denies being in breach of the agreement because she says she does not know how much she owes and she denies that she failed to make punctual payments. This defence was not proceeded with at hearing.
- [5] She also denies that the agreement was properly cancelled and alleges that the registered notice of cancellation was never posted because the proof of posting sheet states that 7 letters were posted on that day but there were 8 letters listed. This defence was also not proceeded with.
- [6] Respondent is no stranger to these courts nor a stranger in the art of raising bogus and unarguable defences. In the case of Firstrand Bank t/a Wesbank and Inina Weltman-Shmaryahu case number 18229/2010 and Firstrand Bank t/a McCarthy Finance and Inina Weltman-Shmaryahu case number 18230/2010 and Firstrand Bank t/a Wesbank v Inina Weltman-Shmaryahu case number 18243/2010 (*unreported decision*), respondent opposed summary judgment applications for the return of high priced motor vehicles.
- [7] She inter alia argued that the wording of the summons did not sufficiently accord with the terms of the signed agreement. This argument was dismissed as irrelevant.
- [8] She challenged the delivery of the section the 129(1)(a) notice upon her chosen *domiculum* despite the fact that it had been served by the deputy sheriff.

- [9] She pretended not to have received this notice despite the fact that receipt was acknowledged by her then attorney of record.
- [10] She raised the argument that service by the sheriff was insufficient and that in the circumstances in this matter service had to be effected by ordinary mail because no method of service had been chosen in terms of section 65.
- [11] She even argued that even if she received the notice from the sheriff it would have been irregular.
- [12] The court observed that even though she had chosen ordinary mail as a means of service:
- "it would to my mind be over technical and unfair to the plaintiff to rule that delivery of the notice by the deputy sheriff to the defendant at her residential address, being the domicilium chosen by her, does not constitute delivery of the notice as required by section 130(1)(a) of The NCA. The form of the notice complies in all respects with the requirements of section 129(1)(a) of the act".*
- [13] She also contended that the cancellation notice of the agreement had not been served on her before the summons. This contention was also rejected by the court *inter alia* because cancellation was also contained in the summons itself.

- [14] In the present matter the only defence raised by the respondent is that the section 129 Notice was not received by her and that there was no compliance with the provisions of section 65 of the National Credit Act in regard to sending this notice.
- [15] Mr van Rensburg on behalf of the respondent argued that service by registered post was not prescribed in the Act or in the agreement signed by the parties. His argument was that because there was no preferred method of service chosen by the respondent only service in terms of section 65.2 could apply and that section provides for various methods of service including posting but only by ordinary mail. He argues that sending the notice by registered mail constitutes a non-compliance with section 65.2 and that therefore the notice is sent at the credit providers risk and not at the debtors risk. He argues that posting by registered mail does not equate to posting by ordinary mail.
- [16] Respondent denies receiving the section 129 notice at all and Mr van Rensburg argues that applicant cannot send a notice by registered post in these circumstances. He also argues that in terms of section 34 of the Constitution the sending of a section 129 notice must be strictly complied with in order to protect the respondent's constitutional rights to have a consensual determination of the disputes between the parties. He maintains that a section 129 notice would have alerted the respondent to her rights to have a debt review and that this right was protected by section 34 of the constitution which provides that

"Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum."

- [17] He says that the purpose of section 34 of the Constitution is cited in section 3 of the Act which records that the act is designed to *"promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers, by"*
- [18] Mr van Rensburg pointed out that reference to section 34 of the Constitution is really designed to "buttress" his argument in connection with the faulty service of the notice in terms of section 129.
- [19] Having regard to the purposes of section 34 as quoted above there is nothing in the form of service which offends the promotion of transparency, effectiveness or any of the other purposes of the section quoted above.
- [20] Section 65(2)(a)(i) *inter alia* sanctions the mechanism of delivery of a notice in terms of the act by ordinary mail in the absence of a chosen method of service.

- [21] The suggestion that service by registered post is inferior or less effective than service by ordinary mail, is absurd.
- [22] In the case of *Rossouw and another v Firstrand bank* case no 640/2009, the court of appeal considered the implications of this section and the fact that section 65(2) set out six methods by which a document may be delivered. In that case the respondent actually chose delivery by ordinary mail and the court said at para 29 of the judgment:

"From the available options which include personal delivery at their expense, the appellants chose delivery by post. In my view, that the method chosen was registered mail, which is not one of the options provided by s 65(2), does not offend the provisions of the section. The legislature has sanctioned postal delivery. Registered mail is, in any event, a more reliable means of postage and cannot harm either party's interests. I am reinforced in this view by the catch-all provisions of s 168 of the act dealing with service of documents, which in the legal context is synonymous to 'delivery of documents'. This section deems sending a document by registered mail to a person's last known address proper service, unless otherwise provided for in the Act. These provisions, I think, put it beyond doubt that the legislature was satisfied that sending a document by registered mail is proper delivery. And 'send' according to the The Shorter Oxford English Dictionary means 'to despatch (a message, letter, telegram etc) by messenger, post etc.' It does not include 'receipt' of the sent item."

- [23] This opinion is echoed in the following passage in para 56 of the judgment where the court recorded a notice sent by registered post complies with the Act which only requires service by ordinary mail *"but the greater includes the lesser"*.
- [24] In the case of *Starita v Absa Bank Ltd and another* 2010(3) SA 443, the court in para 18.7 said *"In the present case there was no manner expressly chosen by the consumer from the options made available to her in terms of s 65(2)(a) (save for choosing a domicilium address). The first respondent chose to mail the notice. Using registered mail is an a fortiori position, of better efficacy than ordinary mail, which cannot be objectionable."*
- [25] Furthermore s 7 of the interpretation act 33 of 1957 defines the meaning of "service by post" to mean service by registered post unless the contrary is proved.
- [26] Essentially therefore, the question to be determined is whether service by registered post can in any circumstance be less effective or acceptable than service by ordinary mail. Ordinary common sense dictates that the greater does include the lesser in a case like this and the respondent's argument is devoid of any merit whatsoever.

[27] The application in terms of para 1 and 4 of the notice of motion is accordingly granted.

A handwritten signature in black ink, appearing to read 'AJ Weinkove', written over a horizontal line.

WEINKOVE, AJ