IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No 7241/11

In the matter between:

NEDBANK LTD Plaintiff

and

ANELENE BINNEMAN Defendant

And 12 similar cases

Court: GRIESEL J

Heard: 11, 13 & 15 June 2012

Delivered: 21 June 2012

JUDGMENT

GRIESEL J:

[1] Until the recent judgment of the Constitutional Court in *Sebola v Standard Bank*,[1] it was held to be sufficient for purposes of obtaining default judgment in this Division if it was alleged and proved that the requisite notice in terms of s 129(1) of the National Credit Act, No 34 of 2005 ('the Act') had been despatched to the consumer via registered mail. This was usually done by affixing the post office's registered slip to the copy of the notice and confirming this fact by way of an affidavit as contemplated by Practice Note 33(2). As the *Sebola* matter demonstrates,[2] however, this form of notice is not always reliable, as postal items sometimes end up at the wrong post office. In the result, it was held by the majority in that case (per Cameron J):

'Hence, where the notice is posted, mere despatch is not enough. This is because the risk of non-delivery is too great. . . 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 section 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.

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.'[3]

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[1] [2012] ZACC 11, handed down on 7 June 2012.
[2] Para 5 of the judgment.
[3] Paras 75 and 76.

[2] In the week following the *Sebola* judgment, a large number of applications for default judgment came before this court, most of them based on mortgage bonds registered over immovable properties which constitute the homes of the respective defendants. In most of them, the representatives of the various credit providers managed to obtain the relevant 'track and trace' reports. In many instances – such as the present case – the report indicates that the postal item in question had been despatched to, and did in fact reach, the correct post office, but that it had subsequently been returned to sender. The question that arises in these circumstances is whether the credit provider would in these circumstances be entitled to default judgment – assuming, of course, that the papers are otherwise in order.

[3] In *Munien v BMW Financial Services,*[4] the interpretation of the provisions of ss 129 and 130 of the Act were exhaustively dealt with by Wallis J (as he then was). He came to the conclusion that –

'provided the credit provider delivered the notice in the manner chosen by the consumer in the agreement and such manner was one specified in s 65(2)(a), it is irrelevant whether the notice in fact came to the attention of the consumer. As the consumer has the right to choose the manner in which notice is to be given, it is for the consumer to ensure that the method chosen will be one that is reasonably certain to bring any notice to his or her attention'.[5]

[4] In *Rossouw v FirstRand Bank,*[6] the SCA specifically referred to *Munien's* case and adopted the same approach:

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[4] 2010 (1) SA 549 (KZD).
[5] Para 22.
[6] 2010 (6) SA 439 (SCA) para 8.

'As previously stated, the parties agreed in clause 21 of their agreement to a *domicilium* and mode of delivery of notices as envisaged by ss (65)(2) and 96. 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 in 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 with '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 *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.

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.' [7]

[5] More recently, in *Majola v Nitro Securitisation 1*,[8] the SCA referred with approval to the above-quoted passages from the *Rossouw* and *Munien* judgments.

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[7] Paras 30–32 per Maya JA.
[8] 2012 (1) SA 226 (SCA) para 19 n4.

[6] I do not read the judgment of the majority in *Sebola* as having overruled these principles. What it did do, was to clarify that 'despatch' *per se* is insufficient; there must, in addition, be proof that the notice reached the appropriate post office:

'Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will *in the absence of contrary indication* constitute sufficient proof of delivery.'[9]

[7] It is not immediately apparent what exactly is meant by the phrase 'in the absence of contrary indication' in the present context.[10] However, it is not necessary for purposes of this judgment to speculate as to its meaning. In the present case the defendant, in terms of clause 11 of the mortgage bond, chose the mortgaged property as the *domicilium citandi et executandi* and agreed that –

'. . . any notice or other document or legal process to be given, sent or delivered under this bond shall be regarded as sufficiently given, sent or delivered to the Mortgagor if delivered at that mortgaged property or sent by prepaid registered post to that mortgaged property, in which latter case it shall be presumed to have been received on the third day following the date of posting unless the contrary is proved'.

[8] Here, the available evidence shows that the letter in terms of s 129 was sent by registered post to the mortgaged property and that it actually reached the appropriate post office, namely Kraaifontein. In accordance with settled authority, I accordingly hold that the plaintiff has

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[9] Para 87 (emphasis added). (See also paras 75 and 76, quoted above in para 1.)
[10] Cf also para 77, where the same phrase appears.

duly provided notice to the consumer as required by s 129(1) of the Act. The risk of non-receipt therefore rests squarely with the defendant.

[9] At the hearing of the present application, the plaintiff's counsel handed up an affidavit deposed to by a secretary in the office of the plaintiff's attorneys of record, in which she states that she had telephonically discussed the matter with the defendant, informing the latter that the matter was on the roll for hearing and enquiring whether or not the defendant intended opposing it, alternatively whether she would settle the outstanding balance. In response, the defendant replied 'that she was not financially in a position to settle the balance and that she was not going to oppose the application for default judgment'. This tends to confirm that the defendant's default is intentional and not due to inadequate notice.

[10] In these circumstances, I am satisfied that the plaintiff is entitled to default judgment, as claimed. For the reasons set out above, default judgment is **GRANTED** in accordance with the draft order at **pp 46–47** of the papers, which I have initialled.

Other matters

[11] In the following matters, I am likewise satisfied that the plaintiffs have made out a proper case for **default judgment, which is GRANTED in accordance with draft orders initialled by me**:

(a) 4862/10 *Standard Bank v DR Arendse*

(b) 25284/10 *Standard Bank of South Africa Ltd v QH & F Smart*

(c) 25309/11 *Standard Bank v SS Retyu*

(d) 1067/12 *Nedbank Ltd v T & NC Ngcobo* [11]

(e) 1295/12 *Nedbank Ltd v DKJ & YJ Shaw*

(f) 1587/12 *Absa Bank Ltd v M Donough*

(g) 3024/12 *Nedbank Ltd v DW & MG Leibrandt* [12]

(h) 3037/12 *Absa Bank Ltd v I Parker*

(i) 3981/12 *Standard Bank v HP Phillips*

[12] In the following matters, I am not satisfied that there has been due compliance with the provisions of s 129(1)(a) of the Act. In each of these matters, orders are accordingly issued in terms of s 130(4)(b) of the Act, **POSTPONING** the applications on the terms as set out below:

(j) 13501/11 *Standard Bank v MD Davidson*[13]

(k) 23022/11 *Standard Bank v AS & CJ Williams*[14]

(l) 1001/12 *Standard Bank v J & LH Shand.*[15]

(m) 3035/12 *Absa Bank Ltd v AD & LM Abrahams.*[16]

[13] In each of the matters (j) – (m), it is ordered as follows:

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[11] The amount of the claim is only R70 890,52, hence I am not inclined to issue an order declaring the property executable for that sum. Furthermore, costs must be taxed on the appropriate magistrate's court scale.

[12] The amount of the claim is only R95 960,00, hence similar considerations apply as in *Ngcobo's* case, n 11 *supra.*

[13] Three different addresses were selected by the defendant in terms of three successive mortgage bonds. Notice was only delivered to one of them.

[14] Similar problem as the previous matter, except only two addresses chosen.

[15] According to the 'track & trace' report the postal item went to Swellendam (as stated in the mortgage bond), whereas the property is actually situated in Heidelberg.

[16] The 'track & trace' report does not indicate that the postal item reached the correct post office.

(1) **The application for default judgment is postponed *sine die*;**

(2) **The plaintiff is afforded an opportunity to provide a notice to the defendant as contemplated in ss 129 and 130 of the National Credit Act, 34 of 2005, in any manner authorised by the Act and chosen by the defendant in terms of s 65(2) of the Act;**

(3) **Such notice must, in addition to the normal contents thereof, also reflect –**

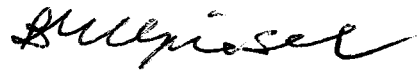
(a) **the fact that action has been instituted against the defendant(s), the relevant case number and the fact that it has been postponed *sine die*;**

(b) **the current amount of arrears;**

(c) **that the defendants' rights in terms of the Act remain unaffected by the above direction;**

(4) **The plaintiff is granted leave, at least TEN days after compliance with paras 2 and 3 above, to set down the application for default judgment on notice to the defendant and on proof by affidavit of the matters as contemplated by s 130(1)(b);**

(5) **Costs shall stand over for later determination.**



B M GRIESEL
Judge of the High Court