

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

CASE NO.: 4064/2013

In the matter between:

FIRSTRAND BANK LTD trading as WESBANK

Plaintiff

and

MLAMLI BALISO

Defendant

Coram:

Van Staden AJ

Date of Hearing:

23 October 2014

Date of Judgment:

21 January 2015

JUDGMENT

INTRODUCTION

1. On 15 March 2013 Firststrand Bank Ltd trading as Wesbank ('the plaintiff') issued summons against Mr Mlamli Baliso ('the defendant') for payment of the amount of R224 880.27, arising from an instalment agreement in respect of a certain Mercedes-Benz motor vehicle entered into with the defendant. In the particulars of claim it is alleged that plaintiff repossessed the vehicle and that the amount claimed represents the difference between the outstanding balance of the instalment agreement and the proceeds of the vehicle sold by public auction.
2. It is also alleged in the particulars of claim that the plaintiff sent a notice in terms of section 127(2) of the National Credit Act 34 of 2005 ('the NCA') to the defendant. In this notice, annexed to the particulars of claim, it is stated that the plaintiff was placed in possession of the said Mercedes Benz vehicle. No allegation is however made that the defendant, as consumer, gave written notice to the plaintiff, as credit provider, of the termination of the agreement, as provided for in section 127(1)(a) of the NCA.

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3. Defendant pleaded to the particulars of claim and alleges in this plea that the plaintiff has failed to comply with section 127(2)(b) of the NCA in that the plaintiff sent the notice in question by ordinary mail and not registered mail. It is furthermore pleaded that the defendant never received this notice. Defendant specifically denies the allegation that the vehicle was repossessed by the plaintiff and pleads that it was voluntarily surrendered by the defendant. Reference is specifically made in the plea to the majority judgment in *Sebola and Another v Standard Bank of SA Ltd and Another*.¹
4. Defendant filed a counterclaim in which he requests repayment of the amount of R95 000.00, which has allegedly been paid to plaintiff as instalments. In the counterclaim the defendant also relies on the *Sebola* judgment and specifically alleges that this judgment dictates that, in instances where consumers aver in contested proceedings that a section 129(1) or a section 127(2)(b) notice has not been received, the court must make a finding about the blameworthiness of the consumer for not receiving this notice. Should the court determine that the consumer acted reasonably the proceedings must be adjourned as provided for in section 130(4)(b) of the NCA. Based on these arguments the defendant alleges that he is entitled to the repayment of the instalments already advanced to the plaintiff.
5. On 10 June 2014 defendant filed an exception to the plaintiff's particulars of claim. In this exception it is alleged that the summons does not disclose a cause of action because the section 127(2)(b) notice was forwarded by ordinary mail and not registered mail and because the notice was not received by the defendant. Apart from a prayer for the upholding of the exception with costs, the defendant also asks for an order dismissing the plaintiff's action with costs. In an alternative prayer the defendant requests an adjournment of the proceedings, coupled with an appropriate order in terms of section 130(4)(b) of the NCA.

¹ 2012 (5) SA 142 (CC)

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6. On the same date, 10 June 2014, an application by the defendant for the condonation of the late filing of his exception was granted by this Court.
7. The matter was delayed by a number of procedural steps and applications, culminating in the hearing of the exception on 23 October 2014.
8. In his heads of argument, Mr Van der Merwe, counsel for the plaintiff, initially opposed the exception on two grounds, more particularly that the defendant is barred from raising the exception in question due to the long delay in bringing this exception only after the plea had been filed. Since the Court condoned the late filing of the exception there is obviously no merit in this defence. The plaintiff however also opposed the exception on the ground that it is without any merit.
9. At the hearing on 23 October 2014 counsel for the plaintiff sought condonation for the late filing of his heads of argument. This application for condonation was granted.

DISCUSSION

10. The defendant, who appeared in person in this court, limited the exception to one ground only, namely that the plaintiff failed to allege that the delivery of the section 127(2)(b) notice took place in accordance with the guidelines stipulated in *Sebola* and in *Kubyana v Standard Bank of SA*². This matter therefore involves the interpretation of section 127(2) and the requirements for the section 127(2)(b) notice and the question whether the *Sebola* guidelines for section 129(1) notices also apply to section 127(2)(b) notices.
11. It is trite that the meaning of provisions in legislation must be determined by considering the language utilized and the context of the provision in question in the legislation read as a whole. The purpose of the provision

² 2014 (3) SA 56 (CC)

must also be considered.³ In my view the headings to chapters of the NCA should be considered to determine a proper interpretation of section 127(2)(b) of the NCA.⁴ Section 127 and 128 of the NCA falls under Part B of chapter 6 of the NCA under the heading 'Surrender of goods'. Section 129 and 130 on the other hand falls under part C of chapter 6 under the heading 'Debt enforcement by repossession or judgment.'

12. In *Sebola* it is pointed out that the main objective of the NCA is to protect consumers, but that an interpretation of the NCA calls for a careful balancing of the competing interests of consumers and credit providers.⁵
13. In *Sebola* it was also pointed out that section 129(1)(a) stipulates that the credit provider 'may' draw the consumer's default to his or her notice. The court furthermore referred to the wording of section 129(1)(b)(i) of the NCA in terms of which the credit provider cannot commence legal proceedings to enforce an agreement without first providing notice to the consumer. The effect therefore is that such notice is compulsory. Section 130(a), on the other hand provides that a credit provider can only approach a court to enforce a credit agreement at least 10 business days after the section 129(1) notice had been 'delivered' to the consumer. The court accordingly held that at the very least dispatch of the section 129(1) notice must be effected by registered mail and the credit provider must make averments that will satisfy the court on a balance of probabilities that the notice reached the consumer.⁶

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 at p603E-604D; *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC) para 17 and *Kubyana* para 18-19 at 64B to 65B

⁴ *Turfontein Estates v Mining Commissioner Johannesburg* 1917 AD 419 at p442-443

⁵ *Sebola* para 40 at 153D to 154D and *Kubyana* para 20 and 21 at 65C to F

⁶ *Sebola* para 66 – 75 at p164C to 166E; Scholtz and others: *Guide to the National Credit Act (NCA Guide)* paras 12.4.4 at p12-13 to 12-34

14. In distinction to sections 129 and 130 of the NCA, section 127(2)(b) merely requires that a credit provider must give written notice to a consumer setting out the estimated value of the goods and any other prescribed information. There is no question of any requirement in respect of the section 127(2)(b) notice that anything must be drawn to the notice of the consumer or that the notice must be 'delivered' to the consumer.⁷
15. Section 65 of the NCA dealing with the delivery of documents clearly does not take the matter any further. It is however significant that section 65(2)(a)(i) provides that 'delivery' includes the making available of a document to the consumer by ordinary mail.
16. There is, in my view, a significant difference between the notice referred to in section 129(1)(a) and 129(b)(i) of the NCA on the one hand, and the section 127(2)(b) notice on the other. The first deals with the required procedure before debt enforcement can take place and the other with the surrender of goods by a consumer. One would have expected that a consumer surrendering a vehicle must realise that the vehicle will probably be resold. Such a consumer therefore is in a position to look after his or her own interest and to enquire about the estimated value or any other relevant prescribed information.
17. In my opinion therefore it is not necessary for a credit provider to allege in the summons that a section 127(2) notice was delivered by registered mail subject to the requirements spelt out in the *Sebola* judgment.
18. No allegation is made in the particulars of claim that the defendant voluntarily surrendered the vehicle or gave written notice of termination of the agreement as provided for in section 127(1)(a) of the NCA⁸. It is however not necessary to deal with the impact of this failure. In *Jowell v*

⁷ Compare *Sebola* para 61-66 at 162C to 164D

⁸ For the necessary allegations see Scholtz op cit para 12.8.3 at p12-56 to 12-57

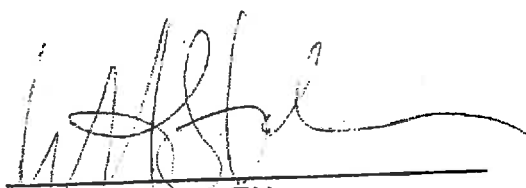
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*Bramwell-Jones and Others*⁹ it was specifically stated that excipients are limited to the terms in which they frame their exceptions and by the issues which those exceptions raise. If excipient's wish to rely upon a point other than that taken, they need to amend their exception.¹⁰ In this instance the exception is limited to the question whether it was sufficient for the plaintiff to deliver the section 127(2)(b) notice by ordinary mail.

19. Section 30(3)(a) of the NCA specifically provides that the court may only determine a matter in respect of proceedings to which section 127 of the NCA applies, if the procedures required by section 127 have been complied with. In section 30(4)(b) it is furthermore stipulated that, in the event of a credit provider not having complied with the provisions of the NCA as contemplated in section 30(3)(a), the court must adjourn the matter and make an appropriate order setting out the steps that the credit provider must take before the matter may be resumed.
20. I conclude that the section 127(2)(b) notice forwarded by the plaintiff to the defendant by ordinary mail was sufficient. The plaintiff therefore complied with the provisions of the NCA and there is no basis for the matter to be postponed.

CONCLUSION

21. I find for the plaintiff and the exception, the prayer for dismissing the plaintiff's action, as well as the alternative prayer for a postponement of the matter, are dismissed with costs.



W. VAN STADEN
Acting Judge of the High Court

⁹ 1998 (1) SA 836 (WLD) at 898F – 899B

¹⁰ *Barclays National Bank Limited v Thomson* 1989 (1) SA 547 (A) at 556J – 557A

