

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited t/a Wesbank v Adriaanse (19347/2013) [2015] ZAGPPHC 723 (13 August 2015) [2015] ZAGPPHC 723

COURT

North Gauteng High Court, Pretoria

BEFORE

MNGQIBISA-THUSI

CASE / FILE NUMBER

19347/2013

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REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA,

PRETORIA

JUDGMENT

Date: 13/8/15

Case No: 19347/2013

Reportable/Not reportable

FIRSTRAND BANK LIMITED t/a WESBANK

Plaintiff

and

JUSTIN ADRIAANSE

Defendant

MNGQIBISA-THUSI, J

[1] The plaintiff seeks the following relief against the defendant relief:

1.1 the return of a 2009 BMW XS XDRIVE481 AfTCE70, with engine number 50754408 and chassis number WBAFE82050LK28188 (the vehicle);

1.2 that any damages arising out of the defendants breach of the agreement be postponed sine die;

1.3 that the defendant pays the costs of the action.

[2] The following facts are common cause:

2.1 on or about 27 October 2010 the plaintiff and the defendant concluded a lease agreement for the leasing of the vehicle on the following terms:

2.1.1 that the total rental price would be R796 100.44 (inclusive of VAT) together with interest at a fixed rate of 13% per annum;

2.1.2 that on the date of the conclusion of the agreement the defendant would pay the plaintiff a deposit in the amount of R120 000.00;

2.1.3 that the monthly rental would be R11 899.34 per month, payable over 58 consecutive monthly instalments, with the first instalment payable on 20 December 2010;

2.1.4 that a final instalment of R184 320.00 (balloon payment) would be payable on 20 November 2015;

2.1.5 that the provisions of the National Credit Act 34 of 2005 (the Act) would be applicable to the lease agreement;

2.1.6 that the address to which all legal notices would be delivered at the defendant's physical address, being the chosen domicilium address, being number [.....], Mooikloof, 0081, and all other notices at his postal address [1]

2.1.7 that the plaintiff retains ownership of the vehicle for the period of the agreement; and

2.1.8 that at the end of the lease agreement the defendant has the option of either returning the vehicle to the plaintiff or purchase the vehicle from the plaintiff or enter into a new agreement with the plaintiff to refinance the vehicle.

[3] In its particulars of claim the plaintiff alleges that:

3.1 the defendant has defaulted on his payments since August 2011 and was, at the time summons was issued, in arrears in the amount of R48 210.53;

3.2 a notice in terms of section 129(1)(a)[2] of the Act was delivered to the defendant;

3.3 the defendant failed to respond to the section 129(1)(a) notice; and

3.4 the plaintiff has failed or refused, as required by section 127[3] of the Act, to return the vehicle to the defendant;

[4] In its plea and counterclaim the defendant:

4.1 denies that the plaintiff complied with the provisions of section 129 (1)(a) in that it had not received the section 129 notice as its domicilium address as an address is situated within a security estate which does not have any postal delivery service.

4.2 alleges that even though it is in default with its payments, the plaintiff is in breach of section 81 of the Act in that the loan agreement amounted to reckless lending. However, the defendant has abandoned its counterclaim in which it relied on the provisions of section 81 of the Act;

- [5] The issue to be determined is whether the plaintiff has complied with the provisions of section 129(1)(a) of the Act. The parties agreed that the plaintiff bore the onus of proving compliance with section 129(1)(a) and that the plaintiff had the duty to begin.
- [6] The plaintiff called only one witness, Mr Eugene Botha (Mr Botha), an attorney employed by Hack, Stuppel and Roos, the plaintiffs attorneys. Mr Botha outlined the terms and conditions as set out in the agreement, in particular, the clauses relating to delivery of notices and legal notices. Mr Botha explained that in terms of the agreement the defendant had chosen number 13 Naval Escourt, Mooikloof as his domicilium address. Mr Botha testified that he had been in contact with a post office official who informed him that the Garsfontein Post Office had sent a first notification to the defendant on 27 March 2012 that he had a registered item at the Post Office. Further, that on 30 March 2012 the registered item was sent back to sender (Roodepoort HUB). Mr Botha further testified that the track and trace report was discovered by the plaintiff.
- [7] In his testimony, the defendant admitted the terms and the conditions of the loan agreement, including the fact that he had chosen his physical address as a chosen address to which legal notices should be sent. The defendant testified address chosen was a vacant stand and that there is no way that he could have received the notification from the post office. Further, the defendant testified that he had also given the plaintiff his postal address and did not understand why the plaintiff did not send the section 129 notice to this postal address.
- [8] During cross- examination, the defendant testified that he had not notified the plaintiff of an alternative address even though he was aware that no postal deliveries could be done at the chosen domicilium address. He testified that there are post boxes outside the security complex in which mail is placed. Defendant conceded that without the relevant post box number it would be difficult to place mail into the correct post box.
- [9] The defendant called Mr Phillipus Hattingh (Mr Hattingh), a security officer at the estate where the defendant's domicilium address is located. Mr Hattingh testified that mail at the security complex was delivered into post boxes situated outside the complex and that there was no street addresses. During cross-examination, Mr Hattingh testified that when a sheriff comes to the complex to effect service, the relevant stand owner is called by security to accept service. He conceded that the same procedure would be used with regard to registered mail. In response to a question by the court, Mr Hattingh testified that if mail were addressed to a physical address, it would be put into the correct post box.

[10] Section 129(1)(a) of the Act requires a credit provider, in the event of a customer defaulting on his or her payments and before the credit provider commences litigation, to deliver to the consumer a letter of demand as contemplated in section 129(1)(a). In *Sebola and Another v Standard bank of SA Ltd and Another*[4] the Constitutional Court held that in terms of section 129(1)(a) read with section 130 of the Act, there was no general requirement that the s129(1)(a) notice be brought to the actual attention of the consumer, or that personal service (as suggested by counsel for the defendant) to be effected. Further, the court held that where the consumer has chosen a domicilium address, if the notice is sent by registered mail, which is the safest way of sending mail, the credit provider must make sure that it is sent to the

correct chosen address and to the correct post office.

[11] As stated in *Kubyana v Standard Bank of South Africa Limited*[5], once a service provider has taken the necessary steps in order to bring to the notice of the consumer the section 129(1)(a) notice, it is expected of the reasonable consumer, once notified by the post office that he has a registered item, that he would collect the registered item. Furthermore, the court in *Kubyana* (supra) stated that:

"[53] Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the

consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section

129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non- receipt is the consumer's unreasonable behaviour".

[12] In the present case, it cannot be disputed that the plaintiff sent the section 129 notice to the correct chosen address of the plaintiff and that the registered item did reach the relevant Post Office (Garsfontein). In *Rossouw and Another v First Rand Bank Limited*[6] the court stated that:

"[29] It appears to me that s 96, which deals with the address for delivery of legal notices and a s 129(1)(a) notice by its very nature must fall into this category - is relevant for present purposes and must be read with s65(2)".

[13] The fact that the defendant did not receive the registered mail notification as he alleges that there are no street deliveries at the address he chose, is irrelevant. The defendant elected the address to which the section 129 notice was sent aware of the fact that there were difficulties with postal deliveries at that address. It could not be expected of the plaintiff to have known of these difficulties unless the defendant alerted it to them. I am satisfied that the plaintiff has indeed taken the necessary steps to bring to the defendant's attention, his default. I am satisfied that the plaintiff has shown that it had

complied with the provisions of section 129(1)(a) read with the provisions of section 65(2) and 96[7].

[14] It is common cause, as it has not been denied by the defendant, that the last payment the defendant made was in 2012. The defendant is therefore in serious default of his obligations under the agreement. It is also not in dispute that the defendant has failed or refused to return the vehicle to the plaintiff even though the agreement, in particular, clause 12.4.4, read with the provisions of section 127 of the Act, obliges a debtor to return the vehicle if he is in breach of his payments on the rental of the vehicle.

[15] I am satisfied that the plaintiff has shown sufficient cause for the relief prayed for and that an order in terms of the particulars of claim should be granted.

[16] With regard to costs, there is no reason why the plaintiff should be denied the costs of this application. Furthermore, I am of the view that, even though the defendant has abandoned his defence and/or counterclaim based on section

81 of the Act, the plaintiff is entitled to costs attendant to preparation,

appearance and the witnesses who would have testified on behalf of the plaintiff with regard to the defendants abandoned defence.

[17] Accordingly, the following order is made:

17.1 That the defendant return the 2009 BMW XS XDRWE481 A!TCE70, with engine number 50754408 and chassis number WBAFE82050LK28188 (vehicle) to the plaintiff;

17.2 That any damages arising from the defendant's breach of the agreement be postponed sine die;

17.3 That the defendant pays the costs of the action, including costs for preparation, appearance and the witnesses who would have testified with regard to section 81 of the Act.

NP MNGQIBISA-THUSI

Judge of the High Court

Appearances

For the Plaintiff: Adv Du Plessis

Instructed by: Hack Stuppel & Ross Attorneys

For Defendant: Adv Swart, SC Instructed by: Etienne Naude Attorneys

- [1] Clause 17.2 of the agreement provides that: "U kies die fisiese adres wat u in die Kwotasie/ Krediet koste verskaf het, as die adres waar regskenninggewings ingevolge hierdie ooreenkoms vir alle doeleidings nan hierdie Ooreenkoms beteken kan word."
- [2] Section 129(1)(a) of the Act provides that "(1) If the consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date".
- [3] Section 127 (1)(b)(ii) of the Act provides that: "otherwise return the goods that are the subject of that agreement to the credit provider's business during ordinary business hours within five business days after the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider."
- [3] Section 127 (1)(b)(ii) of the Act provides that: "otherwise return the goods that are the subject of that agreement to the credit provider's business during ordinary business hours within five business days after the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider."
- [4] 2012 (5) SA 142 (CC).
- [5] 2014 (3) SA 56 (CC).
- [6] 2010 (6) SA 439 (SCA).
- [7] Section 96 (1) and (2) provide that: "(1) whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at-
- (a) the address of the party as set out in the agreement, unless paragraph (b) applies, or (b) the address most recently provided by the recipient in accordance with subsection (2). (2) a party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand registered mail, or electronic mail, if that other party has provided an email address."

- [7] Section 96 (1) and (2) provide that: "(1) whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at-
- (a) the address of the party as set out in the agreement, unless paragraph (b) applies, or (b) the address most recently provided by the recipient in accordance with subsection (2).
 - (2) a party to a credit agreement may change their address by delivering to the other party a written

notice of the new address by hand registered mail, or electronic mail, if that other party has provided an email address."

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