

SOUTH AFRICA / JUDGMENT

Firststrand Bank v Maseng and Others (23082/22) [2022]

ZAGPPHC 908 (18 November 2022)

[2022] ZAGPPHC 908

COURT

North Gauteng High Court, Pretoria

BEFORE

Reinard Michau

CASE / FILE NUMBER

23082/22

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FLYNOTES:

DELIVERY OF
SECTION 129 NOTICE
Civil
procedure – Execution – Residential immovable property
– Section 129 notice – Delivery by registered
mail –
Contention that notice never received – Delivery satisfied
by written confirmation of delivery to post
office –
Delivery presumed – Whether defendant received slip
irrelevant – Rebuttable by defendant –
National Credit
Act 34 of 2005, s 129.
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
Number: 23082/22

REPORTABLE:

YES
OF
INTEREST TO OTHER JUDGES: YES

REVISED: YES/NO
In
the matter between: -
FIRSTRAND
BANK
APPLICANT
AND
THULANGANYO
MASENG
FIRST RESPONDENT
DIMAKATSO
LUCRICIA MASENG
SECOND RESPONDENT
CITY
OF EKURHULENI MUNICIPALITY
THIRD RESPONDENT
MIDSTREAM
HILL HOME OWNERS'
ASSOCIATION
FOURTH RESPONDENT

JUDGEMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 18 November 2022.

1. The applicant is FirstRand Bank ('FNB'). The first and second respondents are married in community of property and I will refer to them as one; namely 'Maseng' or where appropriate, "the respondents".
2. This is an application for the payment of a sum of money, together with interest as well as to have an immovable property declared specifically executable in terms of rule 46A(8). There is the usual ancillary relief relating to issues such as the reserved price, writs of execution and the like.
3. The property is in Midstream Estate Extension 53 and is subject to the restrictive conditions in favour of Midstream Home Owners' Association, the third respondent, and falls within the jurisdiction of the fourth respondent. The third and fourth respondents take no part in these proceedings and my reference to "respondents" will be a reference to the first and second.
4. FNB filed a practice note in terms of which it is stated that the common cause facts are:
 - 4.1. That the first and second respondents have entered into a credit facility agreement with the applicant;

4.2. That the applicant advanced the sum of R954 000,00 to the first and second respondents in terms of the credit facility agreement;

4.3. That the first and second respondents caused a mortgage bond to be registered over the immovable property to which I have referred earlier;

4.4. That the first and second respondents breached the credit facility agreement by failing to make payment of the monthly instalments in terms thereof;

4.5. That the first and second respondents failed to remedy the aforesaid default despite written demand;

4.6. That, at the date of the practice note the outstanding amounts under the credit facility agreement was R684 143,18 as at March 2022 and the arrears was R200 108,66 and that the last payment was made on 30 April 2021[1];

4.7. That the applicant caused section 129 notices to be sent to the first and second respondents via registered post and that a first notification was sent to the first and second respondents. This last contention in the practice note is denied. This lies at the heart of the debate between the parties.

5. The question, in essence, revolves around the issue whether or not section 129(1) as read with section 130 has been complied with.

6. I set out below the provisions of section 129 and 130 of the National Credit Act (the 'NCA'), as per the amendment done in 2014.

'129. Required procedures before debt enforcement.—

(1) If the consumer is in default under a credit agreement, the credit provider—

(a) 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; and

(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before —

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

(2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to

proceedings in a court that could result in such an order.

- (3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

[Sub-s.(3) substituted by s. 32 (a) of Act No. 19 of 2014.]

- (4) A credit provider may not reinstate or revive a credit agreement after—

(a) the sale of any property pursuant to—

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123.

[Sub-s.

(4) amended by s. 32 (b) of Act No. 19 of 2014.]

- (5) The notice contemplated in subsection (1) (a) must be delivered to the consumer—

(a) by registered mail; or

(b) to an adult person at the location designated by the consumer.

[Sub-s.

(5) added by s. 32 (c) of Act No. 19 of 2014.]

- (6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).

[Sub-s.

(6) added by s. 32 (c) of Act No. 19 of 2014.]

- (7) Proof of delivery contemplated in subsection (5) is satisfied by—

(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or

(b) the signature or identifying mark of the recipient contemplated in subsection (5) (b).

[Sub-s.

(7) added by s. 32 (c) of Act No. 19 of 2014.]

130. Debt procedures in a Court.—

(1) Subject to subsection (2) a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and—

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (10), or section 129 (1), as the case may be;

[substituted by s. 33 of Act No. 19 of 2014.]

(b) in the case of a notice contemplated in section 129 (1), the consumer has—

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and

(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant

property to the credit provider as contemplated in section 127.

(2) In addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if—

(a) all relevant property has been sold pursuant to—

(i) an attachment order; or

(ii) surrender of property in terms of section 127; and

(b) the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.

(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that—

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;

(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and

(c) that the credit provider has not approached the court—

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii) despite the consumer having—

(aa) surrendered property to the credit provider, and before that property has been sold;

(bb) agreed to a proposal made in terms of section 129 (1) (a) and acted in good faith in fulfilment of that agreement;

(cc) complied with an agreed plan as contemplated in section 129

(1) (a); or

(dd) brought the payments under the credit agreement up to date, as contemplated in section 129 (1) (a).

(4) In any proceedings contemplated in this section, if the court determines that—

(a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) (a), or has approached the court in circumstances contemplated in subsection (3) (c) the court must—

(i) adjourn the matter before it; and

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;

(c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may—

(i) adjourn the matter, pending a final determination of the debt review proceedings;

(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85 (b); or

(iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor

to discontinue the debt review proceedings, and make an order contemplated in section 85 (b);

(d) there is a matter pending before the Tribunal, as contemplated in subsection (3) (b), the court may—

(i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or

(ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination; or

(e) the credit agreement is either suspended or subject to a debt rearrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter.

7. The case for the respondents is that the provisions of section 129(1) of the NCA have not been complied with. This contention can, in my view, be dismissed on one of two bases. For the reasons which follow, I will grant the application.
8. The first basis upon which it can be dismissed is on the basis of the judgment of the Full Court in *Benson and another v Standard Bank of South Africa (Pty) Ltd and others*[2] to which I am bound, despite criticism of it in some lower courts.
9. It is common cause that the section 129(1) notice was attached to the founding papers of the application which was served on Maseng. It is also common cause that Maseng picked up the section 129(1) notice on 9 June 2022 at the relevant Post Office. It is also common cause that this is longer than 20 business days prior to the hearing of this application. The respondents therefore have had a considerable period of time prior to the hearing of this application within which to exercise their rights as envisaged by the NCA.
10. Sections 129 and 130 of the NCA have been the subject of previous litigation. An important case in this regard is *Sebola and another v Standard Bank of South Africa Ltd and another*[3].
11. The case, which, importantly, was decided before section 129 in its now amended form, had to consider and make a finding on what is meant by “delivered” in section 129, as read with section 130. In trying to give meaning to the word ‘delivered’, the constitutional court, at para 53 said the following:

‘First, it is impossible to establish what a credit provider is obliged and permitted to do without reading both provisions. Thus, while section 129(1)(b) appears to prohibit the commencement of legal proceedings all together (‘may not commence’), section 130 makes it clear that where action is instituted without prior notice, the action is not void. Far from it. The proceedings have life, but a court “must” adjourn the matter, and make an appropriate order requiring the credit provider to complete specified steps before resuming the matter. The bar on proceedings is thus not absolute, but only dilatory. The absence of notice leads to a pause, not to nullity. But to deduce this, it is necessary to read section 129 in the light of section 130. Section 129 prescribes what a credit provider must do (notices contemplated) before judgment can be obtained, while section 130 sets out how this can be proved (by delivery).’

12. Therefore, even if the version of the respondents is to be believed, that does not mean that I can dismiss this application. It still has “life” as described by the Constitutional Court.
13. In *Benson* the full court said this at para 16:

‘In *Sebola*, the Constitutional Court made the following clear. First, the commencement of proceedings without prior notice does not render the proceedings a nullity, but simply requires an adjournment of proceedings so as to permit the credit provider to give notice before the proceedings may be resumed. A failure to give notice does not invalidate the proceedings but is simply dilatory (see para [53]). Second, the delivery of the notice in terms of ss 129 and 130 requires the credit provider to aver and prove that the notice in s129 was delivered to the consumer. Where the post is used, it will suffice to show delivery if there is proof of registered

dispatch to the address of the consumer, together with proof that the proof that the notice reached the appropriate post office for delivery to the consumer, in the absence of proof to the contrary (see para [87] and [88]).

And further at para 18 in Benson:

‘What the Sebola decision did not have to decide is whether any non-compliance with the provisions of the NCA that is cured prior to the hearing of the application for judgment by default, nevertheless requires an adjournment of the application. The answer to this question flows from the provisions of s 130 (4) (b)(ii). If there are no further steps that are required of the credit provider, there can be no purpose served in adjourning the proceedings. Further delay would serve no purpose, and, as Sebola makes plain, any non-compliance does not invalidate the proceedings but simply delays their finalization to ensure that due process is followed and the credit receiver can enjoy his or her rights. Of course, the non-compliance must be properly cured, and the credit receiver must be given the statutory time to consider his or her position. But if that is done between the time that the non-compliance is cured and the time that the matter is heard in court, to require an adjournment for its own sake has no point and is inconsistent with the scheme of ss129 and 130. In so far as the decision in Kgomo suggests otherwise, I am in respectful disagreement with it.’

14. Mr Mosala, appearing for Maseng, when making submissions on this issue simply asked for the matter to be adjourned without, in any manner, submitting what the purpose for that would be and how it would affect the way forward. He made no suggestions as to any further directions or steps to be taken. I can think of none. Certainly the Respondents do not deal with this in the answering evidence and have not therefore suggested any.
15. Given my understanding of Benson, I find that section 129(1) has thus been complied with. I cannot think of any further steps to be taken and a postponement will only be an ‘adjournment for its own sake’. That would, in the words of Benson, be ‘inconsistent with the scheme of ss129 and 130’. I am bound by this judgement and, in any event, am in agreement with the reasoning set out therein. On this basis I would grant the relief sought.
16. I also deal with the other ground of opposition, in case that I am incorrect in following the Benson case. This is the contention of Maseng that the section 129(1) notice was not ‘delivered’ as required by section 129 as read with section 130 of the NCA. The section of course now reads differently to that which was considered by the Constitutional Court in Sebola. I am advised by counsel for FNB that there is no judgment of which he is aware in this division that has interpreted sections 129(5)-(7) since they have been included in the NCA by way of the 2014 amendment.
17. The Respondents have attached to the answering papers as annex “P5”[4] the “Parcel Tracking Results” which seems to indicate that on 21 April 2022 at 08:32am the first notification was sent to the recipient. That is what the document says. That, according to the submissions made by counsel for the respondents means that the first notification was

received by the correct Post Office and that it had been delivered to the relevant Post Office. FNB did everything that it was required by the NCA to do was the submission to me by counsel for the Respondents. To me it is also indicative of the fact that the first notification was, at least, sent to Maseng.

18. But the Respondents contend that they never received this notice. In support of their contention they rely on a letter from the Post Office dated 27 June 2022 addressed to them which states as follows:

‘The item with tracking no. RC478817708ZA[5] was received at Halfway House post office on the 21st of April 2022 and a first notification was issued by the Mail Delivery section on the same day to deliver. During this period delivery of mail was irregular because of transport challenges.

The abovementioned tracking number it is hereby confirmed that it was collected by recipient on the 9th of June 2022 with a tracking no. issued by sender and not a notification slip issued by the Post Office.’

19. The Respondents also rely on the handwritten note by an unidentified person[6] dated 10 June 2022 on the ‘Parcel Tracking Results’ which states the following:

‘Dear sir / madam

Due to transport challenges there was no delivery of mail in Midstream – from March, April and May 2022’.

20. The respondents contend this in the answering affidavit:

‘On the same day when the item was received by the post office it was then sent to the mail delivery section for delivery to the

Respondents.

When the notice arrived at the mail delivery section it was never sent to the respondents and this was due to transport challenges which the Post Office was experiencing specifically with delivery of mail to Midstream.

According to the Post Office there was no delivery of mail to Midstream for March, April and for May 2022. We attach herein a letter from the branch manager of the Halfway House post office Mr Ndaba and a note made by Mr Malatji the mail delivery section head on the tracking and trace report. Attached herein respectively as annexures “T4” and “T5”.

On the 1st June 2022 the respondents received form 2A Notice of Application for Monetary Judgment from the Applicants.

Upon receiving legal advice the respondents went to the Half Way House to determine if indeed a sec 129 notice was delivered to the post office which they ignored according to the allegations in the applicant’s plea.

On the 9th of June the Respondents went to Half Way House and obtained a Sec 129 Notice for the first time from the post office”.

21. The aforesaid is crucial to the opposition for the Respondents in order to rebut the onus on them to show that despite the postal records they did not receive the notice. It lies at the heart of the defence.
22. But the letter from the Post Office and the handwritten note on the ‘Parcel Tracking Results document is clearly of a hearsay

nature[7]. There are no supporting affidavits from the authors of those documents. They are inadmissible, as there is no application currently before me to lead evidence of a hearsay nature in terms of the relevant statute and even if they are admissible, they carry no weight. There is no explanation as to why there are no supporting affidavits from the authors. On my enquiry why there are no supporting affidavits, the submission was made to the effect that no court has ever required this.[8] I was concerned about the hearsay nature of the evidence and, cognisant of the far reaching effect of the relief sought, I raised this with counsel for Maseng and debated it at length with him. He was, naturally, reluctant to concede its hearsay nature, no doubt realising the impact that it would have on the case. This debate was late in the afternoon and the matter could not finish and was adjourned to the next morning. At one stage during the debate he suggested calling witnesses from the Post Office for oral evidence. Then he wanted to bring an application to postpone the matter. I advised him he should do so if he wishes and I will consider the merits of the postponement application and adjudicate thereon. At 16:00 I adjourned for the day and advised counsel for Maseng that he must consider his position and advise the court the next morning of his plans. When court resumed he made further submissions on the merits of the matter, but there was no application for postponement to lead further evidence.

23. Subsequent to the Sebola decision, section 129 has been amended somewhat. I have quoted it earlier on in my judgment. It seems to me that the amendment was made due to the difficulties the Constitutional Court encountered in giving meaning to the word ‘delivered’ in section 129(1) as read with section 130, as there was no definition of it in the NCA. My speculation might be incorrect in this regard, but it matters not.
24. Counsel for FNB contended that he is unaware of any decision in this division dealing with sections 129(5) – (7) subsequent to the amendment. He did however refer me to the case of Wesbank v Ralushe[9], a decision of the East Cape Division, Grahamstown which, incidentally, finds itself in disagreement with the judgment in the Benson case on the issues referred to in my judgment[10]. I need not address those concerns expressed in the Wesbank case because I am bound to follow the Benson case. It is my view, in any event, that the reasoning in the Benson case is sound.
25. Nevertheless, Wesbank deals with these sections and states:

‘[52] Section 7 of the Interpretation Act provides for service of a properly addressed posted registered letter as deemed to be effected “unless the contrary is proved”.

- [53] Section 129 (5) the NCA requires the notice to be “delivered” by inter alia registered mail. Section 129 (7) provides that “Proof of delivery contemplated in subsection (5) is satisfied by: (a) Written confirmation by the postal service of delivery to the relevant post office.....”.
- [54] It seems to me that this presumption is one of law rebuttable only by facts on a balance of probabilities (the Defendant bearing the onus) showing failure of the prior fact being “written confirmation”. Once established delivery to the consumer is satisfied it being unnecessary to go to the next step in the evidence, being delivery by the post office to the address (of a registered slip).
- [55] In this matter there is the relevant proof of delivery to the relevant post office and that is sufficient. Whether or not Defendant received a slip or not or whether this was delivered is legally irrelevant, delivery being presumed.

THE

FACTS

- [56] Plaintiff has presented the relevant proof of posting by registered mail and a track and trace report demonstrating not only written confirmation by the postal service of delivery to the relevant Queenstown Post Office but further dispatch of the first notice to the consumer.
- [57] The evidence of the Defendant was that his physical address has an external post box in the perimeter available to the postal services and that he checked this regularly on his arrival at home from time to time.
- [58] He said that at the relevant time he followed this procedure and that no postal slip relevant was received.
- [59] Had he received a slip he said that he would have collected the item and if he had received a Section 129 notice would have gone to Plaintiff bank to negotiate payment.
- [60] There are then the two mutually contradictory versions applicable. Put in terms of Sebola and Kubyana the onus is on the Defendant to rebut the inference/presumption of delivery, but in the context of Section 129. The question is however that I have concluded that once proof of delivery to the correct post office is proved and not rebutted this is the end of the matter. If I am incorrect this issue rebuttal however falls to be considered on the facts.'
- [25] I am in agreement with this reasoning and, on the facts of this case, given the inadmissibility of the evidence to which I have referred, the provisions of section 129 have been complied with. Here, too, there is proof of delivery to the relevant

Post Office and proof of the track and trace results. There is no admissible evidence which, on a balance of probabilities, disturbs

this evidence in any manner. This means that Maseng has not discharged the onus to rebut the presumption of delivery.

[26] Not a single submission was made by counsel for Maseng on rule 46A and he unequivocally said that the only ground of opposition was non-compliance with section 129 of the NCA. I now have deal with the issue of the reserve price of the property. In this matter there is a large discrepancy between the market value and the municipal value. The market value is said to be R11 400000.00 and the municipal value approximately R 4 900000.00. What I have done is this. I have reduced the market value by 27% and subtracted the outstanding amount due to the local authority of R 210 870.00 and the outstanding amount due for levies of R 3990.00 and reached an amount of approximately R8 100 000.00. In attempting to strike a fair balance to both parties, I have decided to set a reserve price of R8 000 000.00 and make the order set out below.

Order

[27] Judgment is granted in favour of the applicant against the first and second respondents in the following terms:

27.1 Payment of R684 143,18;

27.2 Interest on the sum of R684 143.18 at the rate of 7.75% per annum, calculated daily and compounded monthly in arrears, from 4 March 2022 to date of payment, both days inclusive.

[28] The following immovable property is declared specifically executable in terms of rule 46(8) (d) read with rule 46(8)(e) with a reserve price of R8 000 000.00

ERF 4207 MIDSTREAM ESTATE EXT 53 TOWNSHIP, REGISTRATION DIVISION J.R., PROVINCE OF GAUTENG;

MEASURING 2003 (TWO THOUSAND AND THREE) SQUARE METRES HELD BY DEED OF TRANSFER NO T08246/2016

SUBJECT TO THE CONDITIONS THEREIN CONTAIN AND MORE ESPECIALLY SUBJECT TO THE RESTRICTIVE CONDITIONS IN FAVOUR OF MIDSTREAM HILL HOME OWNERS ASSOCIATION, NPC REG NO 2009/015026/08

[29] The registrar is authorised to issue a writ of execution against the immovable property described in prayer [28] (supra), in terms of rule 46(1)(a)(ii) read with rule 46A(2)(c);

[30] The first and second respondents to pay the costs of this application on an attorney and client scale, jointly and severally.

REINARD MICHAU

ACTING JUDGE OF THE HIGH COURT

Date of hearing:

15 November 2022

Date of judgment:

18 November 2022

Appearance

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[1] These statements were not refuted by Maseng

[2] 2019

(1) SA 152 (GJ) 'the Benson' case

[3] 2012

(5) SA 142 (CC)

[4] CaseLines reference L35

[5] It is common cause that this is the correct number

[6] There is a signature attached, but I cannot read it.

[7] As is the rendition of Maseng of what allegedly happened at the Post Office during that period.

[8] Counsel for the Respondents submitted that he appears regularly in matters of this nature. This, seemingly, emboldened him to make this submission.

[9] 2022

(2) SA 626 (ECG)

[10] See paras 28-30 of the Wesbank case

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