

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1199/2015

In the matter between:-

STANDARD BANK OF SOUTH AFRICA LTD

Applicant

and

JOHAN FRANCOIS VISAGIE

1st Respondent

JULIANA VISAGIE

2nd Respondent

HEARD ON: 18 JUNE 2015

JUDGMENT BY: KRUGER, J

DELIVERED ON: 25 JUNE 2015

- [1] Plaintiff applies for summary judgment, seeking payment of R683 220.66, interest, an order declaring fixed property executable and costs on the attorney and client scale.
- [2] The defence is that Defendants applied for debt review during August 2014. On 25 August 2014 plaintiff served its notice to oppose the debt review. In the opposing affidavit the defendants say the plaintiff did not file an opposing affidavit resisting debt review. Defendants were informed by an attorney of the plaintiff

that plaintiff would not file an affidavit resisting the debt review application. The defendants say summons was issued while the debt review is pending, which cannot be done.

- [3] On behalf of plaintiff Mr Zietsman submits that the plaintiff gave notice of termination of the debt review procedure in terms of section 86(10) of the National Credit Act 34 of 2005. Mr Zietsman says the Notice of termination of the debt review process was sent to the address furnished in the loan application. He says all the plaintiff has to prove is that the notices reached the correct post office, with reference to **Sebola and Another v Standard Bank of South Africa Ltd and Another** 2012 (5) SA 142 (CC).

- [4] From the track and trace report of plaintiff's termination letter it appears that the letter reached the post office, but was not collected. It was returned to sender (D.3 p. 60 "The posted item has Returned back to Sender".)

- [5] In **Absa Bank Ltd v Mkhize and Another and Two Similar Cases** 2012 (5) SA 574 (KZD) Olsen AJ gives a detailed exposition of the position. He had evidence of postal practice. The evidence showed that between 50 – 70 % of registered mail items were unclaimed (par [29]). Ordinary post is by a substantial margin more reliable than registered post (par [35]). Olsen AJ points out (par [45]) that **Sebola** held that despatch of a notice under section 129 is insufficient. There must be proof that the registered item reached the addressee's post office (par [45]). Olsen AJ held that he cannot ignore the fact that the track and trace report established conclusively that the item did not reach the

consumer (par [45]). Olsen AJ went on to hold that the majority judgment in **Sebola** decided that actual notice to the consumer is indeed the standard set by section 129(1). He referred specifically to par [77] of the **Sebola** judgment where it is said that a reasonable assumption of notification can be made.

“In that context what is conveyed in paragraph 77 of the majority judgment is clear enough. Coupled with the required allegations in the credit provider's summons, proof that the notice reached the correct post office brings about that:

‘it may reasonably be assumed *in the absence of contrary indication*, . . . that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office’.”

(Olsen AJ para [56])

Olsen AJ concluded that there had not been compliance with the procedure under section 129 and postponed the applications for default judgment where proof of notice to the consumer had not been established *prima facie*.

- [6] Ms Le Roux points out that section 86(10) gives the debtor a moratorium of 60 days after having applied for debt review with reference to **Collett v Firststrand Bank Ltd** 2011 (4) SA 508 (SCA) par [12] per Malan JA. Mr Zietsman refers to **Hardenberg and Another v Nedbank Ltd** 2015 (3) SA 470 (WCC) where the Western Cape Full Court referred to the SCA case of **Collett** and held that in the context of what the court was asked to decide in **Collett**, that it was not part of the *ratio* in the **Collett** case that the default had to exist at the time that the consumer applied for debt

review. In this case the first and main question is whether the debt review has been terminated. Mr Zietsman sought to distinguish the **Mkihize** case and the basis that here the track and trace report is attached to the summons, whereas the track and trace was only produced after the opposing affidavit had been filed in the **Mkhize** case. I cannot see the difference. The defendant makes the point clearly and unambiguously that no opposing affidavit was filed by the plaintiff in the debt review process. The defendants did not receive notice of the plaintiff's termination of the process.

- [7] Courts are generally reluctant to deprive a defendant of the right to defend the action, except in a clear case (**Skead v Swanepoel** 1949 (4) SA 763 (T) at 767). A circumstance which makes this to be not a clear case is the recently enacted section 86(10)(b) of the National Credit Act which came into operation on 13 March 2015 by virtue of section 26 of Act 19 of 2014 and Proclamation 10 of 2015 dated 13 March 2015:

“(b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.”

- [8] A court may take the view that defendant's position is covered by the new section 86(10)(b). The tendency and intent of the legislation is to allow the debtor time to get out of debt. It is arguable that the debt review has not been properly terminated. Thus section 86(10) constitutes a further possible defence for the defendants. In the circumstances Summary Judgment cannot be granted.

ORDER

1. Summary judgment is refused.
2. Defendants are granted leave to defend.
3. Costs are costs in the cause.

A. KRUGER, J

On behalf of applicants:

Adv P Zietsman SC
Instructed by:
Matsepes Inc
BLOEMFONTEIN

On behalf of respondents:

Adv L le Roux
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