



CONSTITUTIONAL COURT OF SOUTH AFRICA

Mlamli Baliso v First Rand Bank Limited t/a WesBank

CCT 150/15

Date of hearing: 8 March 2016

Date of judgment: 4 August 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in an application for leave to appeal against the dismissal of an exception in the Western Cape Division of the High Court (High Court). The ground for the exception was that a statutory notice in terms of section 127 (2) of the National Credit Act 34 of 2005 (NCA) by ordinary mail is insufficient and not in compliance with the provisions of the NCA.

First Rand Bank (Bank) instituted action against the applicant, Mr Baliso, for payment of an amount of R224 880.27 allegedly outstanding in terms of a credit agreement under the NCA. The Bank alleged that it caused a notice in terms of section 127(2) of the NCA to be sent to the applicant and attached a copy of the notice to the particulars of claim. After filing a plea that contained an allegation that the notice was sent by ordinary mail only, the applicant also filed an exception to the claim, as lacking averments necessary to sustain a cause of action. The High Court held that notice under section 127(2)(b) served a different purpose to that under section 129(1)(a) of the NCA and dismissed the exception. The High Court and later the Supreme Court of Appeal refused leave to appeal.

In the majority judgment by Froneman J, (Moseneke DCJ, Cameron J, Mhlantla J, Khampepe J, Madlanga J, and Nkabinde J concurring) the Court noted a procedural obstacle to the applicant in relation to the attributes of an appealable judicial decision citing the requirements laid out in *Zweni v Minister of Law and Order*, 1993 (1) SA 523 (A). This required the judgment to be final in effect and not open to change by a court of first instance; definitive of the right of the parties; and dispositive of a substantial portion of the relief sought in the main proceedings. Even though there is merit in the submission that there exists no good reason to differentiate materially between the method of complying with the section 127(2) notice requirement and that under section 129(1)(a)(i), this is an opposed matter, not an unopposed application for default judgment. The outcome of the exception will have no final effect on the issues between the parties. Even if the exception is upheld, the respondent should have the opportunity to amend its particulars of claim.

The question of probable receipt of the section 127(2) notice by the applicant, or of it probably coming to the attention of the reasonable consumer, are issues that must be determined by way of evidence at the trial. The exception procedure was inappropriate in the circumstances and leave to appeal was refused.

In a dissenting judgment in which Mogoeng CJ, Bosielo AJ and Jafta J concurred, Zondo J took the view that leave to appeal should be granted because the matter raised important constitutional issues and there were reasonable prospects of success for the appeal. Zondo J focussed on the decision by the High Court that the Bank had complied with section 127(2) of the NCA. He held that that decision was final and appealable because it related to jurisdiction and a decision on jurisdiction is appealable. This conclusion was based upon an interpretation of sections 127 and 130 (3) and (4) of the NCA.

With regard to the appeal, section 127(2) of the NCA obliges a credit provider who has received a certain notice from a consumer or who has received back from a consumer the goods that are the subject of a credit agreement to give the consumer a written notice setting out the estimated value of the goods and any other prescribed information. The merits of the matter concerned the question whether the Bank had complied with section 127(2) of the NCA when it sent such a notice to Mr Baliso by ordinary mail. Zondo J held that that did not constitute compliance with the section. He held that such a notice must be sent in the same way as a notice by a credit provider to a consumer in terms of section 129 of the NCA as decided in previous cases by the Constitutional Court concerning compliance with section 129. Those cases have held that sending a section 129 notice by ordinary mail is not compliance with section 129. Zondo J also held that as compliance with section 127(2) is required to precede the sale by a credit provider of the goods by public auction and the Bank had already sold Mr Baliso's motor vehicle, this means that the Bank would not be able to comply with section 127(2) anymore even if it was given a chance to do so. Therefore, Zondo J concluded that there would be no point in giving the Bank a chance to comply with the section and the correct order would be to uphold the appeal with costs and replace the order of the High Court with one dismissing the Bank's action with costs.