



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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
Date: <u>29/11/2019</u>	
Signature: <u>PP [Signature]</u>	

CASE NO: 31321/2018

In the matter between:

NEDBANK LIMITED

Applicant

and

KHOZA, CHILTON DUMISANI

First Respondent

SIFIKILE MANAGEMENT SOLUTIONS (PTY) LTD

Second Respondent

JUDGMENT ON LEAVE TO APPEAL

LEECH, AJ:

- 1 This judgment is handed down in respect of the application for leave to appeal noted by the respondents¹ against my judgment delivered on 17 May 2019.
- 2 In that judgment I upheld Nedbank Limited's application for an order directing that the respondents pay to it certain sums of money together with interest thereon arising from an agreement of loan. The applicant also sought and I granted an order declaring certain property over which a bond had been registered as security for the loan to be declared specially executable and associated relief, as well as entitling the applicant to execute against certain ceded rights. These orders were accompanied by an order for costs.
- 3 At the hearing in the first instance the respondents opposed the relief sought principally on the basis of an attack founded in the provisions of sections 10 and 25 of the Constitution of the Republic of South Africa, 1996 (*the Constitution*) against clauses 12.1.6 and 12.1.14 of the Agreement. These arguments were coupled to the jurisprudence of this Court following that of the Constitutional Court and the Supreme Court of Appeal (amongst others) relating to the treatment of claims for execution against the primary residence of a judgment debtor.

¹ For the sake of convenience I refer to the Parties as they are in referred to in the main application and judgment, with the result that the first and second applicants in the leave to appeal are the first and second respondents respectively and the respondent in the application for leave to appeal is the applicant.

4 At paragraphs 39 – 45 of my judgment I drew attention to the fact that there had been no attempt made on behalf of the respondents—whether in the answering affidavit filed on their behalf or in the written or oral submissions advanced before me—to challenge the applicant’s reliance on clauses 6, 12.1.3, 12.1.4, and 12.3 of the Agreement. The respondents were silent on the effects of these provisions in relation to them, the applicant’s entitlement to rely on same, or the materiality of the provisions in the context of the contractual regime governing the Parties’ relationship.

5 It is also common cause that the property in question is not the first respondent’s primary residence.

6 It was, in the absence of any opposition having been put forward in relation to the clauses relied on by the applicant that I upheld its claims and granted the relief that I did in its favour.

7 It is hardly surprising then that the application for leave to appeal was pursued before me on a completely new tack that had not previously been advanced on behalf of the respondents:

7.1 In heads of argument that were handed up to me at the commencement of his address and in his oral submissions, Mr Ngcukaitobi (who did not appear in the first instance, but who co-authored the heads of argument submitted in the main

application), challenged for the first time the applicant's reliance on clauses 6, 12.1.3, 12.1.4, and 12.3 of the Agreement.

- 7.2 It was argued that the common law does not, in the absence of a *lex commissoria*, allow for cancellation for trivial or inconsequential reasons. In this instance, the grounds of cancellation were trivial and evinced no actual prejudice to the applicant. Materiality of a breach is intimately wound up in a value judgment of whether or not a contracting party should be entitled to rely on that breach to cancel the contract.
- 7.3 In this instance, it was argued, the breach on which the applicant relied was immaterial and the clauses in question incidental to the Agreement as a whole. The applicant's reliance on the clauses in question was doubtful and the cancellation was therefore trivial and unreasonable.
- 7.4 More importantly, under the Constitution a court will not allow a contracting party to rely on a provision in a contract where either the clause itself or the application of or reliance on the clause in the particular circumstances of a case will offend against any right entrenched in the Constitution.
- 7.5 The applicant's reliance, in this particular instance, on the clauses in question offended against sections 25 and 26 of the Constitution and the principles of

equality and dignity. I therefore ought not to have upheld the applicant's claim because by doing so I allowed a breach of the respondents' constitutional rights.

7.6 There exists a reasonable prospect that another court, faced with these arguments, will find differently and would uphold the appeal and dismiss the application.

8 In light of the fact that these arguments had never been advanced before, I took the precaution of reserving my judgment on the application for leave to appeal, so that I might give them due consideration. I have since done so and, with the benefit of time to look again at the answering affidavit and the cases to which I have been referred, I am now in a position to decide the application for leave to appeal.

9 The first and most immediate problem with the arguments advanced is that these clauses are found within the ambit of a *lex commissoria*. In the circumstances, the Parties have agreed materiality as between them and it is not open to me to revisit that issue on the grounds of my own views on materiality or triviality, reasonableness or fairness.

10 This is a trite principle that has a long pedigree and I don't envisage that there is any prospect—let alone a reasonable prospect—that another court will come to a different conclusion. A very long time ago our courts jettisoned fairness as a justiciable yardstick for avoiding contracts, save in the context of clauses the enforcement of which would be

offensive to public policy or, more recently, that offend in some way against the Constitution.²

11 A *lex commissoria* does not *per se* offend against the Constitution or public policy and I did not hear Mr Ngcukaitobi to argue otherwise.

12 What remains then is to consider whether or not the specific clauses relied on by the applicant either in or of themselves or in the manner in which they have been applied and enforced against the respondents offend against the Constitution.

13 In these respects I am of the following view:

13.1 There is nothing *per se* offensive about the provisions of the Agreement relied on by the applicant such that I can conclude that the applicant ought not to be entitled to rely on them. I also do not think that there is any reasonable prospect of another court coming to a different conclusion in this regard, because there is plainly a reasoned and reasonable commercial rationale for clauses of this nature.

13.2 I should add that I did not understand Mr Ngcukaitobi to be arguing otherwise. As I understood his argument it was not that the relevant clauses are *per se* offensive, but that in the manner and circumstances under which they were put to work in the particular circumstances of this case they became so.

² In so saying I do not lose sight of the fact that public policy has now been suffused with constitutional principles.

- 13.3 The difficulty that the respondents face, however, is that this is not purely a legal argument but is demonstrably also an inquiry of fact. Immediately the argument is premised on the peculiar facts of this case there can be no other conclusion.
- 13.4 This is all the more so when one has regard to the nature of the rights that the respondents, in the application for leave to appeal, sought to rely on: namely, rights to equality, dignity, to property under section 25, and to housing under section 26 of the Constitution. The majority of these rights can apply only to the first respondent and not to the second, but the clauses of the Agreement implicated pertain primarily to the second respondent to the exclusion of the first.
- 13.5 It bears repeating that there is not a single factual allegation contained in the answering affidavit made on behalf of either respondent in support of the arguments now put before me. It seems to me that this is a fatal flaw in the respondents' application for leave to appeal having regard to the grounds on which it is based.
- 13.6 Absenting the factual substratum for this defence to the applicant's claims, the provisions of the Constitution are not implicated: the respondents must show as a fact that the manner in which the applicant seeks to enforce the provisions of the Agreement violate their rights. They have not done so.

13.7 The arguments in support of the application for leave to appeal therefore cannot be sustained, whether before me or at all.

14 In all of the circumstances, I am of the view that there is no basis made out on which another court could come to a different conclusion on this fundamental issue.

15 There were other incidental complaints advanced in relation to aspects of my judgment and the reasoning therein. Even if upheld by another court on appeal these complaints would not affect the outcome.

16 It follows, that the respondents' application for leave to appeal falls to be dismissed.

17 The Agreement provides for costs incurred by the applicant to be recoverable from the respondents on the scale as between attorney and client. There is no reason for me to displace the applicant's entitlement to costs on this agreed basis.

18 Accordingly, I make the following order:

1. The application for leave to appeal is dismissed;
2. The respondents are to pay the costs consequent thereupon on the scale as between attorney and client.

Signed at Johannesburg on this the 26 day of November 2019

A handwritten signature in black ink, appearing to be 'P.P. Leech'.

BE LEECH
Acting Judge of the High Court

Heard on: 07 October 2019

Delivered on: 29 November 2019

Appearances:

Counsel for the Applicant: Tembeka Ngcukaitobi / Karusha Pillay

Instructed by: Mkhabela Huntley Attorneys Inc

Counsel for the Respondents: Leander VR. Van Tonder

Instructed by: Lowndes Dlamini Attorneys