REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/25892

REPORTABLE: **NO**

OF INTEREST TO OTHER JUDGES: **NO**

REVISED: **NO**

19/09/2022

In the matter between:

FIRSTRAND BANK LIMITED	APPLICANT
and	
JACQUELINE NAIDOO	FIRST RESPONDENT
THE EKHURHULENI MUNICIPALITY	SECOND RESPONDENT

JUDGMENT ON LEAVE TO APPEAL

FLATELA AJ:

Introduction

[1] This is an application for leave to appeal against my judgment and order granted on 18th of February 2022. I granted a money judgment against the Applicant in the amount of R2 515 339.28 together with interest at a variable rate of 6.6% nominal per annum calculated daily and compounded monthly from 29 July 2020 to date of payment and costs (on the attorney and client scale). In addition, an order was granted in favour of the First National Bank (the applicant in the main application) declaring the Applicant's (the respondent in the main application) immovable property known as Erf [....] Atlasville Extension [....] Township, Registration Division I.R., Province of Gauteng measuring 1006 square meters, held by Deed of Transfer No. T [....] **("the property")** specially executable subject to a reserve price for the sale thereof in the amount of R1 574 925.00.

[2] The respondent's main cause of action was based on a breach of mortgage loan agreement concluded between the applicant's and the respondent on 14 June 2019 at the applicant's special instance and request. The respondent alleged that firstly the applicant was in breach in that she was in default of her mortgage loan agreement with the respondent in that she paid only one instalment towards the mortgage loan and was in arrears to the amount of R228 504.46, her total indebtedness being R2, 515, 339.28 plus interest of 6.6% per annum calculated daily from 29 July 2020 to date of payment. The respondent admitted to this allegation.

[3] In addition, the respondent alleged that the applicant was in breach of the terms of agreement in that she fraudulently submitted false information to the respondent and misrepresented certain facts pertaining to her financial position.

[4] The applicant's submission was that the court should first determine the validity of agreement regard being had to the fraudulent misrepresentation allegations by the respondent. The applicant submitted that she was precluded from proceeding with her repayments as she was at a risk of paying the loan agreement which in the fullness of time may be declared null and void.

[5] The court was not called to set aside the loan agreement on the basis of fraudulent misrepresentation but it was called to enforce the terms of contract which was legally binding between the parties. I decided the matter on the admitted facts of default and indebtedness by the applicant. I made no finding on the second aspect of breach of agreement by fraudulent misrepresentation.

The Applicant's Notice of Appeal

[6] In her notice of appeal, the Applicant avers that I misdirected myself in granting a monetary judgment in favour of the respondent, and that I should have deferred or postponed the same after confirming that the respondent failed to prove the fraud allegations, allegedly on part of the Applicant, inducing the respondent to conclude a mortgage loan agreement with them. The applicant erroneously referred to as an *'instalment sale agreement'*. There is no merit in this first ground of appeal, I made no finding on the allegations of fraudulent misrepresentations.

[7] The second ground of appeal is that I misdirected myself in granting an order declaring the Applicant's property especially executable. It is averred that I should have dismissed the respondent's prayer for declaration of the property specially executable.

[8] The third ground is that I misdirected myself in arbitrarily setting the reserve price for the property in the amount of R 1 574 925.00 without hearing the parties in arguments regards the reserve price. It is averred that I should have called for arguments and submissions on the reserve before setting the reserve price above.

[9] Fourthly, it is averred that I grossly misdirected myself in not granting the respondent's prayer 8 to confirm the Applicant's right to reinstate the mortgage loan agreement in terms of the provisions of section 129(3) and (4)[1] of the National Credit

[1] Sections 129 (3) and (4) of the 2005 NCA previously provided that –
'(3) Subject to subsection (4), a consumer may –
(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit

Act No. 34 of 2005 **(the NCA)** upon remedy of the arrears in default plus allowable costs and interest.

[10] It was submitted further that by failing/refusing to grant an order alerting the Applicant of her right to re-instate the credit agreement by paying forth the defaulted arrears plus all allowable costs and interests, I failed to protect her rights thereby defeating the purpose of the NCA which serve to provide a level playing field between

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provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement; and -
(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.
(4) A consumer may not re-instate 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'.

However, s 129(3) has been substituted by s 32(a) of the National Credit Amendment Act No. 19 of 2014 which came into effect on 13 March 2015. The amended subsection 3 now reads:
'(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 –

Amendment of section 129 of Act 34 of 2005, as amended by section 32 of Act 19 of 2014 as amended by the National Credit Amendment Act No.7 of 2019

20. Section 129 of the principal Act is hereby amended—
(b) by the substitution in subsection (4) for paragraphs *(b)* and *(c)* of the following paragraphs:
''*(b)* the execution of any other court order or order of the Tribunal enforcing that agreement; **[or]**
(c) the termination thereof in accordance with section 123**[.]**; or''; and
(c) by the addition in subsection (4) after paragraph *(c)* of the following paragraph:
''*(d)* the Tribunal ordered that the debt that underlies a credit agreement is extinguished: Provided that where only a portion of the debt due under a credit agreement was extinguished, this subsection applies only in respect of the portion so extinguished.''.

Which would in effect make section 129(4) of the Principal Act (as amended by the National Credit Amendment Act 7 of 2019) to read:
(4) A consumer may not re-instate 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 or order of the Tribunal enforcing that agreement; or
(c) the termination thereof in accordance with section 123; or
(d) the Tribunal ordered that the debt that underlies a credit agreement is extinguished: Provided that where only a portion of the debt due under a credit agreement was extinguished, this subsection applies only in respect of the portion so extinguished.''

credit providers and consumers and balancing fairly the rights of both in terms section 2[2] and 3[3] of the NCA.

[11] It was also averred that the omission of the main judgment to include prayer 8 of the respondent Notice of Motion i.e., confirmation of the applicant's rights in terms s129(3) rights was in conflict the Full Bench decision of *Absa Bank Limited v Mokebe.*[4]

[12] It was submitted that these grounds entitle her the relief under section 17(1)(a)(i)[5] of the Superior Courts Act No.10 of 2013 **(Superior Courts Act)**.

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[2] **'Interpretation**
2. (1) This Act must be interpreted in a manner that gives effect to the purposes set out in section 3.
(2) Any person, court or tribunal interpreting or applying this Act may consider appropriate foreign and international law.'

[3] **'Purpose of Act**
3. The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-
(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
(b) ensuring consistent treatment of different credit products and different credit providers;
(c) promoting responsibility in the credit market by -
(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by-
(i) providing consumers with education about credit and consumer rights;
(ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
(iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
(f) improving consumer credit information and reporting and regulation of credit bureaux;
(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

[4] Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another (2018/00612; 2017/48091; 2018/1459; 2017/35579) [2018] ZAGPJHC 485; 2018 (6) SA 492 (GJ)

[5] '(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
(a) (i) the appeal would have a reasonable prospect of success; or

[13] It was further submitted that there was some other compelling reason why the appeal should be granted in terms of s17(1)(a)(ii)[6] of the Superior Courts Act.

Notice of Appeal

[14] The Applicant's Notice of Appeal and grounds were not model of clarity. Other than indicating that the whole of the judgment and with its order is being appealed, it is not indicated whether the impugned parts of the judgment that are appealed are based on fact and/or on law or both.

The test for Leave to Appeal

[15] An application for leave to appeal is regulated by s 17(1) of the Superior Courts Act 10 of 2013 which provides:

> '(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
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> *(a)* (i) the appeal would have a reasonable prospect of success; or
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
>
> *(b)* the decision sought on appeal does not fall within the ambit of section 16(2)*(a)*; and

[6] '(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
(a) (1) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[16] Whereas in *Commissioner of Inland Revenue v Tuck*[7] it was sufficient for an applicant to satisfy the Court that that there is a reasonable prospect that another Court *may* come to a different conclusion section 17(1) of the Superior Courts Act raises the bar higher. A demonstration of this stringent threshold can be seen in *S v Notshokove & Another*[8] where Shongwe JA, as he then was, writing for the Court, stated as follows:

> *An applicant, on the other hand, faces a higher and stringent threshold in terms of the Act, compared to the provisions of the repealed Supreme Court Act 59 of 1959.*

[17] In *South African Breweries (Pty) Ltd v the Commissioner of the South African Revenue Services (SARS)*[9] Hughes J, had the following to say about the applicable test:

> *The test which was applied previously in applications of this nature was whether there were reasonable prospects that another Court may come to a different conclusion. See Commissioner of Inland Revenue V Tuck 1989 (4) SA 888 (T) at 899. What emerges from section 17(1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and decided from the word "only" in the said section."*

[18] Section 17(1) of the Superior Courts Act is to be read holistically with s17(1)(a) which further adds that a Court ***may only*** grant leave to appeal where it is satisfied that the applicant has shown reasonable prospects of success to suggest that a different

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[7] *Commissioner of Inland Revenue v Tuck* [1989] 3 All SA 73 (T)
[8] *Notshokove & Another* [2016] ZA SCA 112 para 2
[9] *South African Breweries (Pty) Ltd v the Commissioner of the South African Revenue Services (SARS)* 2017 (2) GPPHC 340 para 5

court ***would*** come to a different outcome. Therefore, if on the merits of the appeal it cannot be said that reasonable prospects of success exist to suggest that a different court would come to a different outcome, the application must fail. The converse is also true if there should be such grounds that are shown to suggest that another court, reasonably, would find differently. Hereto see *The Mont Chevaux Trust v Tina Goosen & 18 Others*[10] where Bertelsmann J held as follows:

> *It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come to a different conclusion. See Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 342H. The use of the word "would" in the new statutes indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against."*

[19] Plasket AJA, as he then was, in ***S v Smith***[11] **2012**

> *What the test of reasonable prospects of success postulates is a dispassionate decision, based on facts and the law that the Court of Appeal could reasonably arrive at the conclusion different to that of the Trial Court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success; that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

Ad condonation for late prosecution of the appeal

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[10] *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2335 (LCC) at para 6.
[11] S v Smith 2012 (1) SACR 567, 570 para 7

[20] Before dealing with the Applicant's grounds for leave to appeal, I first deal a point *in limine* raised by the respondent. I delivered the main judgment on 22 February 2022 and handed down a revised version of it on 14th March 2022. In terms of Uniform Rule 49(1)(b) the application for leave to appeal had to be launched within 15 (fifteen) days from the date of the judgment, i.e., before 6 April 2022. The application for leave to appeal was only delivered on 14 June 2022. On 20th June 2022 the respondent attorneys alerted the Applicant to the issue of the late noting of the appeal and the absence of condonation application. No condonation was sought by the applicant to explain for this time delay. Most shockingly, neither was this appeal prosecuted at the instance of the Applicant. It is the respondent that had to set down the Applicant's own appeal. And then, as if it could not get any better, at the hearing of the appeal the Applicant counsel for the respondent applied for postponement of the hearing of the appeal so that the applicant file an application for condonation for late prosecution of the appeal and the issue of costs to also be deferred. This I refused. The application for the postponement of the hearing of this application is not in the interest of justice.

[21] The respondent submits that on this score alone the application should be dismissed with costs. I agree. However, in the interest of justice I shall indulge the Applicant on her grounds of appeal.

Merits of the Appeal

[22] On the first **"specific"** ground of appeal ,the Applicant avers that I misdirected myself in granting a monetary judgment in favour of the respondent, and that I should have deferred or postponed the same after confirming that the respondent failed to prove the fraud allegations, allegedly on part of the Applicant, inducing the respondent to conclude a mortgage loan agreement with her. The second ground argues the same about the foreclosure of declaring the property specially executable.

[23] In the main, the respondent did not seek to vitiate the loan agreement on the ground of the alleged fraudulent conduct of the Applicant allegedly hoodwinking the respondent into concluding a mortgage loan agreement with them. The respondent sought foreclosure and monetary judgment on the basis of breach of the loan agreement. In her own heads of argument (as respondent in the main application) the Applicant conceded to this much when she identified the respondent (the then applicant in the main application) cause of action to be less the fraud allegations but in fact, her default. I capture in paragraph 21 of the main judgment.

[24] The Applicant conceded to the default as stated and that was enough to grant the respondent the relief. I stated this in paragraph 23 of the main judgment.

[25] No finding was made on the respondent fraud allegations against the applicant nor did I have to as that was not the respondent's main cause of action. The respondent elected to enforce the contract notwithstanding them alleging the purported deceit and fraud. Therefore, finding on this point was rendered nugatory.

[26] In the main judgment I made it clear that the respondent having elected to enforce the contract notwithstanding the additional allegations of breach of contract on the basis of fraudulent conduct against the Applicant, they precluded themselves from later choosing to cancel the contract on the same reason. Therefore, this fear and anxiety that the respondent may elect to cancel the contract at any time upon receiving the applicant's settlement of her arrears is without foundation.

[27] The above also disposes of the Applicant's other ground that I should have refused the relief sought and granted to the respondent until such time the Applicant's fails to service her mortgage loan agreement, but only after the issue of the respondent's fraud allegations have been put to rest. This is submission makes no sense at all. The Applicant, ever since concluding the mortgage loan agreement with the respondent on 17th July 2019 only made her first and last payment on 18th September 2019.

[28] The second ground which reads that I should have refused the respondent's prayer to have declared the Applicant's property specially executable is also without merit. No authority or argument was given in support for this, doing so would have resulted in piecemeal litigation which would have been contrary to the Full Bench decision of *Absa Bank Limited v Mokebe*[12] which held that an order for monetary judgment should be sought together with judgment for foreclosure.

[29] On the ground that I erred in arbitrarily setting the reserve price for the property in the amount of R 1 574 925.00 without hearing the parties in arguments is totally incorrect. The reserve price was pleaded by the respondent. The respondent argued that the reserve price should not be set, alternatively that it should be set at R1 274 382.00. The respondent complied with rule 46 A(5). In her answering affidavit, the applicant disputed the calculations made by the applicant as reserve price as she was still in occupation of the property. She failed to put all the facts before the court regarding the disputed reserve price. If anything, setting that reserve price was to provide a protective mechanism to the respondent so that the property value be realized at the best price as reasonably possible.

[30] In *Mokebe* judgement held that:

> **"if** a debtor fails to place all the facts before the court despite the opportunity to do so, the court is bound to determine the matter without the benefit of the debtors input"

[31] The applicant had all the opportunity to make submissions on the respondent's pleaded reserve price if she felt that it was selling her short.

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[12] Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another (2018/00612; 2017/48091; 2018/1459; 2017/35579) [2018] ZAGPJHC 485; 2018 (6) SA 492 (GJ)

Omission of s129(3) – prayer 8 of the Applicant (then respondent) Notice of Motion

[32] The applicant submitted that failure by the court to include this order in terms of the practise directives of this division is in conflict with Mokebe Judgement. It was submitted that it was never clear to the applicant whether the payment of arrears together with the respondent's prescribed default administration charges would revive the loan agreement.

[33] Section 129(3) of the National Credit Act No.34 of 2005 as substituted by s 32(a) of the National Credit Amendment Act No. 19 of 2014 which came into effect on 13 March 2015 reads:

> '(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 –

[34] The Applicant submits that there is a compelling reason why the appeal should be granted in terms of s17(1)(a)(ii)[13] of the Superior Courts Act because she is at the mercy of the respondent and is further left wondering whether she can still reinstate the mortgage loan agreement by settling the default. She says that this conflicts with *Mokebe* (supra).

[35] The Applicant's issue with this omission was framed *in Mokebe* (supra, para 41) as follows: *Does the fact that the money judgment and the order for executability had*

[13] '(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
(b) (1) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

been given, amount to any such other court order, which prevents the reinstatement – or now reinstatement or revival - of the credit agreement?

[36] The Court answered:

> '[43] What prevents the reinstatement in terms of s 129(4)(b) is only the sale in execution of the immovable property and the realisation of the proceeds of such sale.55 Prior to the realisation of the proceeds of the sale, the mere attachment is no hindrance to the reinstatement of the agreement. The fact that the mortgaged property has been attached pursuant to a default judgment and an order declaring the mortgaged property specially executable, is of no moment. It is only when the mortgaged property has been sold and the proceeds of the sale have been realised that there can be no reinstatement. This is self-evident as there is nothing to reinstate. The agreement is at an end. It is no more. Accordingly, the granting of the money judgment and the executionary order is not a bar to reinstatement of the agreement. It is only when the mortgaged property is sold and its proceeds realised that reinstatement is impermissible. In the words of *Nkata*, the reinstatement 'would be of no use to either party'.
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> [44] However, s 129(3) has been substituted by s 32(a) of the National Credit Amendment Act No. 19 of 2014 which came into effect on 13 March 2015. The amended subsection 3 now speaks of a consumer remedying the default under the agreement instead of a consumer reinstating the agreement
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> [45] It seems to us that the Legislature in effecting the amendment, intended to remedy the impression created that a credit agreement that has not been cancelled, could be reinstated. Prior to cancellation of the agreement, the agreement is extant. There is therefore nothing to reinstate. That being the case it makes sense to speak of remedying the default rather than reinstating the extant agreement.'

[37] Inserting paragraph 8 of the respondent's order would have brought the judgment in line with the progressive Judge President's Practise directives of this division, Not doing is not a bar to reinstatement loan agreement in terms of section 129(3) and (4) of the NCA. The respondent's rights are derived from the statute. The respondent's counsel conceded during hearing that the respondent remains protected by section 129 (3) despite the omission by the court to insert that in the final order. He qualified his submission by stating that if the contract is in existence, the respondent remains protected, if there is no contract there is no protection.

[38] In this case, the loan agreement is in existence. I am not convinced that another court would come to a different finding. Therefore, leave to appeal is refused.

Order

[39] In the result, I make the following order:

1. The application for leave to appeal is dismissed with costs.

FLATELA L

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

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 to be 10h00 on 19 Sep. 22

Date of Hearing: 14 September 2022

Date of Judgment: 19 September 2022

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