REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

11/11/16

CASE NO.: 26749/2011

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

8/11/16
DATE

SIGNATURE

In the matter between:

ABSA BANK LIMITED — **PLAINTIFF / APPLICANT**

and

HERMANUS DE BEER — **FIRST DEFENDANT / FIRST RESPONDENT**

JACOBA JOHANNA DE BEER — **SECOND DEFENDANT / SECOND RESPONDENT**

JUANI LABUSCHAGNE — **THIRD DEFENDANT / THIRD RESPONDENT**

Heard: **22 July 2016**
Delivered **11 November 2016**

JUDGMENT: LEAVE TO APPEAL

A.A.LOUW J

[1] This is an application to obtain leave to appeal my judgment handed down on 18 December 2015.

[2] The first aspect to address is that of condonation for the late delivery of the notice of application for leave to appeal. This notice was delivered as late as 31 March 2016.

[3] I have read the application for condonation from which it appears that there was a miscommunication in the offices of the then attorneys of record of ABSA, VZLR, which led thereto that ABSA only became aware of the judgment on 6 January. ABSA did not immediately instruct its attorneys to deliver an application for leave but ordered a transcript of the proceedings. It further then instructed its trial counsel as well as a senior counsel to provide an opinion on the prospects of success on appeal. The earliest date for a meeting with these counsel was 20 January 2016.

[4] In the meantime ABSA also requested the preliminary views of attorney Ferraz-Cardoso of ENS attorneys on the matter. It is stated that on 14 January Ferraz-Cardoso requested copies of the pleadings for the purposes of furnishing her preliminary views. These were provided to her on 15 January 2016.

[5] On 19 January VZLR obtained a transcript of the trial proceedings and forwarded it to ABSA. On the next day, 20 January, the meeting with VZLR attorneys and the two Pretoria counsel proceeded as scheduled. ABSA requested a written opinion. This was made available to VZLR and transmitted to ABSA on 26 January. ABSA again forwarded it to Ferraz-Cardoso "who again advised (still on an informal basis) that an opinion from another senior counsel should be sought." It was decided to brief Mr Loxton SC as he is regarded by the bank as *the* expert on the National Credit Act.

[6] With reference to the passage quoted in the previous paragraph I am at a loss to understand what "the informal basis" means. If ABSA at any stage during January delivered a notice of application for leave it could still have been seen as reasonable delay. If one only counts the days from 6 January the 15 court days still would have expired on 27 January.

[7] A party who seeks leave to appeal and has a written judgment in its possession surely is in a position to draft a notice of application for leave to appeal. This is especially so where the litigant is ABSA, one of the leading banks in South Africa with many legal advisors and ready access to top firms of attorneys and counsel.

[8] Instead what ABSA did after the opinion received during January was to brief Loxton SC for an opinion. The first contact with Loxton was a telephone call on 29 January when his availability was ascertained. It seems that he was not readily available.

[9] The founding affidavit for condonation further states that in the period that expired before Loxton was seen there were many meetings and discussions in ABSA's legal department. It is stated in paragraph 42 of this affidavit that:

> *"Internally, we decided that an appeal was indeed necessary, but that the opinion of Advocate Loxton SC would have to be obtained before further steps were taken."*

This luxury is by no means afforded to a litigating party and was done in deliberate breach of the rules of court.

[10] The opinion by Loxton was produced on 29 February. Thereafter it took further internal deliberations by ABSA before the notice was delivered on 31 March.

[11] I regard the delay as serious and find that the whole period of delay has not been explained adequately.

[12] As regards the application for condonation I accept that it also took time to draft but there is no requirement that it has to be filed simultaneously with the application for leave. In my view the applicant should at the latest during January 2016 have filed the application for leave, and if for any reason the application for condonation was not ready by that date, have filed such afterwards. The procedure that should have been followed then was that, after all opinions have been obtained, to supplement the application for leave, if necessary.

[13] Turning to the merits, I firstly wish to point out that the crux of my judgment is not being attacked i.e. that it is totally unacceptable, indeed reckless, to add the income of the surety to that of the lenders to determine whether the lenders qualify for the loan. This is a self-evident proposal and was at the trial conceded by the bank's employee who further stated that after the 2008 banking and financial crisis this was no longer done. From this finding I reasoned that such an "assessment" is no assessment at all because it is irrational. That brought section 83(1)(a) into play in terms whereof I set aside the consumers' obligations.

[14] I could have set aside all or part of the obligations but for the reasons I state in paragraph 65 of the judgement I set aside the obligations in total.

[15] In written argument Mr Loxton SC makes the point that the setting aside of the entire loan together with the bonds have an anomalous effect, namely that consumers are then in a better position than they would have been had the loans not been extended to them at all. It is no doubt so that they are in a better position but I do not regard it as anomalous. I have been at pains to point out in my judgment that this is the "penalty" that befalls a bank when it provides reckless credit especially "one of the worst examples of reckless credit" as stated by the respondents' expert witness and which passage I have quoted in paragraph 46 of my judgment. To this I may add that credit was only sought for R300 000 but that R500 000 was lent and advanced.

[16] It is further stated in paragraph 13.19 of the written argument that I should not have made the finding of recklessness in respect of the entire loan but only the further R500 000 of 2008. This argument leaves out of account what I have stated in the first paragraph of my judgment namely that in terms of clause 32 of the 2008 loan any previous loan agreement was replaced. Thus it was the "totale hoofskuld" in the amount of R1 151 430 that had to be scrutinised.

[17] Lastly I may mention that the following statement in paragraph 13.3 of the written argument finds no support in the evidence:

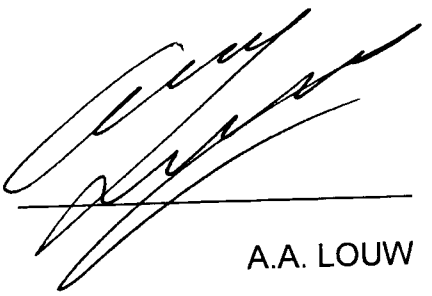
> *"The difficulty of course is that although the third defendant was a surety in respect of her parents' debts since 2006, she was also an adult person within the first and second respondent's immediate family or household who, it was common cause, assisted them financially."* (my emphasis)

The evidence was that she lives in Pretoria-North and has her own household. She also does not have it broad it financially and just manages to break even. When she is able to give money to her parents she does so as do other members of the family.

[18] I do not believe that there are reasonable prospects of success on appeal.

Order

1. The application for condonation is dismissed with costs.



A.A. LOUW

Judge of the High Court