IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 47197/2014

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

27-MAY-2016 .....

DATE SIGNATURE

In the matter between:

ARISTOTLE THOMAS MATHUNZI Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LTD Respondent

DATE OF HEARING : **27 MAY 2016**

DATE OF JUDGMENT : **27 MAY 2016**

JUDGMENT IN RESPECT OF APPLICATION FOR LEAVE TO APPEAL

MANAMELA AJ

[1] This is an application for leave to appeal an *ex tempore* judgment granted on 18 August 2015 refusing an application for rescission of judgment. I also furnished what I consider comprehensive reasons, on application by the applicant, on 01 April 2016. The reasons for the order granted, in my view dealt comprehensively with all the issues and I therefore consider it the judgment in this matter.

[2] The applicant seeks leave to appeal the judgment. He contended in the notice of application for leave to appeal that I erred in my judgment, on what appears to be several grounds. The notice is not an embodiment of clear craftsmanship. Apart from several errors, it employs language not particularly conventional in a Court of law. I am also throughout the notice referred to or addressed as "the Learned Acting Judge S.J. Manamela".[1] I am not certain as to whether the "S.J." was meant to be the initial letters of my forenames [which I do not have] or inadvertent referral to "AJ" for acting judge. But, evidently the words acting judge precedes the address or reference. Further, the dismissal of the application for the rescission of default judgment is said to have been "both wrongful and unlawful"[2] and to have "failed, neglected and/or omitted to properly or at all to read the papers filed of record in the court file".[3] To put it mildly, this is not a respectful characterisation of the judgments of a court. Practitioners, no matter their level of professional experience, have a duty and responsibility for the language they choose to employ in their papers. They should strive to acquit themselves well in this regard by using proper language. One can be creative, but this brings about added requirements of ensuring that the nature and extent of the creativity doesn't stray beyond professional or court parlance. Perhaps, a certain amount of

[1] See first (unnumbered) paragraph on p 2; par 2 on p 6; par 3 on pp 7-8; par 6 on p 8 and par 7 on p 9 of the notice.
[2] See par 7 on p 9 of the notice.
[3] See par 1.1 (i) on p 4 of the notice.

conservatism is warranted in drafting, being to stick to the old and trusted, so to speak. Often working from a trustworthy precedent may be a good point of departure, lest one tread on the side which may appear disrespectful to the Court. But, I will let absolutely nothing to turn on this.

[3] The applicant's grounds of appeal are captured in the following passages from the notice:

"1.

1.1 The Learned Acting Judge committed a fundamental error of failing to take special note of the following basic point that –

(a) The indulgence agreed by between [sic] the Applicant/Defendant and the Respondent /Plaintiff expired on 15th June 2014;

(b) The amount which the Applicant/Defendant had to pay in order for him to settle the arrears in respect of the bond repayment was R53,245.96 [Fifty Three Thousand, Two Hundred and Fourty [sic] Five Rand, Ninety Six Cents];

(c) (i) The total amount paid by the Applicant/ Defendant on 14th June 2014 was and is R53,000.00 [Fifty Three Thousand Rand) instead of R53,245.96.

(ii) The R53,245.96 amount was short paid by an amount of R245,96 which is 0.46% of the R53,245.96.

(d) The Applicant / Defendant proceeded to make yet another payment in the sum of R10 500.00 [Ten Thousand Five Hundred Rand] on 18th June 2014 prior to the date of the issue of the Combined Summons .The latter payment brought the total amount paid by the Applicant /Defendant to R63, 000.00 [Sixty Three Thousand Rand] thereby placing the Applicant/Defendant's credit agreement account in credit and in good standing to transcend the arrear bracket which by agreement of the parties was to be paid;

...

(g) Moreover and in particular, as the Applicant /Defendant's credit agreement

account was both in credit and in good-standing, there existed no legal right and /or title on the part of the Respondent /Plaintiff to ever institute civil action against the Applicant /Defendant based on the self-same credit agreement.

...

(i) erred in that the Honourable officer failed, neglected and/or omitted to properly or at all to read the papers filed of record in the court file;

...

2.

The Learned Acting Judge S.J Manamela accordingly misdirected himself when he adjudicated the application for the rescission of the default judgment, given the issues raised above and which are glaring on the face of the papers filed by the parties in the court file in particular the credit and good-standing status of the Applicant/Defendant credit agreement account as at the date of the issue of the Combined Summons.

3.

The Learned Acting Judge S.J Manamela erred in neglecting and /or failing and /or refusing to see the irregularity in the process of Respondent /Plaintiff litigating against the Applicant /Defendant such litigation arising from the credit agreement.

4.

The Learned Acting Judge S.J Manamela over-emphasized the sanctity and binding effect of agreements on the one hand and failed to equally emphasize the fact that the Applicant/Defendant actually put his all into seeing to it that he demonstrated the performance of his contractual obligations towards the credit agreement by maintaining its credit status and good-standing in conformity to the agreement reached with regard to the arrears being made good.

5.

The Learned Acting Judge S.J Manamela also ought to have found that given the facts as demonstrated in the papers as at the date of the granting of the default judgment as well as based in the rescission application and opposition thereof ,that there was no basis for the institution of the Combined Summons...

> In the prevailing circumstances it is submitted that the dismissal of the application for the rescission of the default judgment was and is both wrongful and unlawful. It is submitted that another court may come to a different conclusion that [sic] the decision arrived at by the Learned Acting Judge S. J. Manamela. Based on the afore-going, the application for leave to appeal ought to succeed."

[4] Mr VM Magwane appeared at the hearing of this application on behalf of the applicant. He steered his submissions away from the grounds of appeal as stated in the notice. His main point of contention was based on the fact that, the applicant said he did not receive the notice sent to him in terms of section 129 of the National Credit Act 34 of 2005. He submitted that this should have brought doubts - equating to triable issues - in the mind of the Court that the applicant should be granted an opportunity to defend the matter at trial. He relied on the decisions in *Sebola*[4] and *Kubyana*[5] in his submissions in this regard. In sum, he contends that the moment a consumer say I did not receive a notice due to some circumstances that alone should convince the Court dealing with a receipt or non-receipt of a notice in terms of section 129 that there is a *bona fide* defence. I do not agree with this interpretation of the two aforesaid decisions. I rely on what I have said in the judgment in respect of those decisions. Further, the submissions appear to craft a new case for the applicant in this regard. The applicant as stated in the impugned judgment categorically said that he did not receive the notice or even the summons because he had left the *domicilium* address. I am satisfied with what is stated in my judgment and do not wish to add anything thereto.

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[4] *Sebola & Another v Standard Bank of South Africa Limited & Another* (CCT 98/11) [2012] ZACC 11; 2012 (5) 4 SA 142 (CC).
[5] *Kubyana v Standard Bank of South Africa Limited* (CCT 65/13) [2014] ZACC 1; 2014 (3) SA 56 (CC).

[5] Mr JH Mollentze appeared at the hearing on behalf of the respondent. His submissions were simply that this Court has to determine the existence of prospects of success or other grounds as stated in section 17 of the Superior Courts Act 10 of 2013. He submitted that there are any reasonable prospects of success for the appeal contemplated by the respondent. For, the purpose of sections 129 and 130 of the National Credit Act has been achieved. He submitted that the applicant had already defaulted on an arrangement he made with the respondent, apart from his breach of the credit agreement. The applicant is not saying what other options he would have exercised in respect of the section 129 notice. I agree.

[6] Based on the above and my judgment, I hold the opinion that neither the full Court of this Division or the Supreme Court of Appeal or any other Court for that matter, would come to a different conclusion in this matter. The application will be dismissed with costs.

[7] This application has a bit of history of enrolments. There were previous enrolments and appearances on 19, 22 and 29 April 2016. At sittings on the first two dates, the Court could not proceed due to administrative problems, which had nothing to do with the parties. On the sitting of the 29 April 2016, the applicant did not appear and costs were reserved. The applicant communicated with the respondent through representatives and complained about short notice in respect of the notice of set down. At that stage there were new attorneys appointed by the applicant in substitution of its previous ones. Although, I wasn't entirely satisfied with this conduct on the part of the applicant and its representatives in respect of the 29 April 2016, I will nevertheless make no costs order in respect of the three aforementioned dates. The respondent's counsel also appeared not to be insisting on any costs for those dates.

I had already ordered the applicants to pay the costs for the sitting on 13 May 2016 on an attorney and client basis. I will confirm this order hereunder.

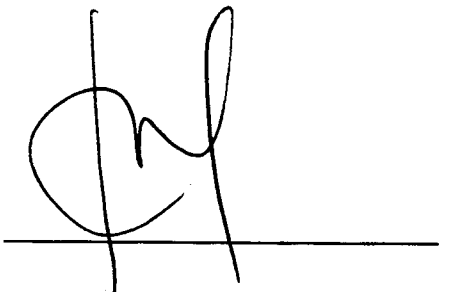
[8] Therefore, I grant the following order:

a) application for leave to appeal the judgment of 18 August 2015 is dismissed;

b) the applicant is liable to the respondent for costs of the application;

c) the costs awarded in terms of b) hereof shall exclude costs in respect of the activities of 19 April 2016; 22 April 2016 and 29 April 2016.

d) the applicant is liable to the respondent for costs occasioned by the postponement of the application on 13 May 2016 on an attorney and client scale.



K. La M. Manamela

Acting Judge of the High Court

27 May 2016

APPEARANCES :

For the Applicant	:	Adv VM Magwane
Instructed by	:	Mapulana Maponya Inc
		Pretoria
For the Respondent	:	Adv JH Mollentze
		Findlay and Niemeyer Inc
		Pretoria