REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

3/11/16.

CASE NO: **45484/2014**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

SIGNATURE 03/11/2016. DATE

MARCUS VISSER **APPLICANT**

AND

NEDBANK LTD **RESPONDENT**

JUDGMENT

THOBANE AJ,

[1] This is an application for leave to appeal against a judgment and order of this court granted on 21 April 2016. This application is opposed by the respondent.

[2] The grounds of appeal are set out in the notice of application for leave to appeal. I do not propose to traverse each one of them as some overlap. At the core of the application for leave to appeal is the question whether the matter was correctly decided by this court.

[3] The Superior Courts Act 10 of 2013 lays out the approach or test thus;

Leave to appeal

17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a) the appeal would have a reasonable prospect of success; or

(b) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

It must be mentioned from the onset that nothing in this matter, as raised, falls within the second category or stands to be determined on the basis of the second leg of the test. It follows that the test, *in casu,* is whether there is a reasonable prospect of success on appeal.

[4] In argument before me counsel for the applicant adopted the approach of not dealing with the grounds of appeal in a chronological manner as they appear in the notice of application for leave to appeal. In this

judgment I do not intend to do so either. I will nevertheless deal with each and every ground raised.

[5] I now turn to consider, briefly, the various grounds of appeal as they appear in the notice of application for leave to appeal. The applicant states that the court erred in not finding in a particular way. The details are listed in paragraphs 1.1. to 1.3. which I deal with below.

Para 1.1.

I can not discern what the applicant is aggrieved at about the court's finding to the effect that the applicant was solely responsible for the loading of debit orders on the overdrawn account. When the application for rescission of judgment was argued, nothing was pointed at by the applicant, in support of the contention that he could not have and most importantly, did not authorize any deductions from the account held with the respondent. Whereas the fact that any deductions particularly those, as identified in this matter, can only be authorized by the applicant, it appeared to have been lost to the applicant how that authorization can take place. The following perspective is crucial. Applicant himself stated, though speculatively, that the respondent deducted, from his account, a debit order which ought to have been deducted, presumably, from his other account. What is lost to the applicant is that he is the only person who would have details of a debit order to be paid, the account to which it ought to be paid and the date on which such payment is to take place. If this court is to grant leave on this ground, it would be on the basis that another court would find that the applicant did not provide details of any debit order to be made active on the applicant's account. Based on the evidence tendered during the hearing of the matter, such a finding would be inconsistent with the facts. It follows that this ground has no prospect of success.

Para 1.2.

The applicant states that service of the summons was bad in that it was effected by affixing to the "main gate". This is not true. Service was effected by affixing to the "main principal door". Nowhere in the court's judgment is reference made to service of process by affixing to the main principal gate. I am prepared to assume in favour of the applicant that he may have meant to say service was effected by affixing to the main principal door. Even on the generous approach, the service is not bad in law. It follows therefore that this ground of appeal has no prospect of success.

Para 1.3.

Lastly, the applicant argues that this court erred in its finding that the applicants did not have a *bona fide* defence against the respondent's claim. Since this ground of appeal permeates most if not all of the grounds of appeal, it shall be dealt with at a later stage.

[6] The next basis for applying for leave to appeal is that this court erred in dealing with the various circumstances under which an application for rescission can be brought and eventually the findings, which according to the applicant, are erroneous. In its judgment the court dealt with the requirements for an application for rescission of judgment. They were stated as falling under common law, Rule 31(2)(b) as well as Rule 42. In terms of the latter, the court indicated that the applicant had failed to highlight or point to any error, ambiguity, omission or mistake common to the parties. When the application for leave to appeal was argued, the applicant's legal representative remained of the view that the error relied upon was the fact that the registrar did not refer the matter to

open court purely on the basis that there was no personal service. Had the registrar been aware, so the argument went, that service was by way of affixing, default judgment would not have been granted. Clearly this can not be said to be an error as defined and as it would apply to applications for rescission of judgment. The registrar of this court is not barred from considering applications for default judgment where service was effected by affixing. The respondent when approaching court for default judgment was aware of the manner of service. This can not be said to be an error. I am unable to agree with the applicant that the judgment was erroneously sought and erroneously granted. The reasons advanced as the basis for the submission that there was an error, do not displace the court's view that bringing an application for rescission of default judgment on the basis that there was an error, (Rule 42(1), but failing to point it out is misplaced. I do not believe that there are reasonable prospects that a court of appeal will find otherwise.

[7] The applicant, in the application for rescission of judgment stated as follows in paragraph 20.1.1,

> *"*.....
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> .....
>
> .....*It is clear from the onset that the Respondent obtained judgment out of this Hounourable Court by the Registrar in the absence of me or any legal representative. As discussed above, if the Respondent was duly informed that I moved out of the immovable property before judgment was granted, he may not have given judgment."*

Nowhere in the founding papers did the applicant deal with the contention by the respondent that there was a duty on him to notify the respondent of the change of address. The closest the applicant came to doing so was to state that he applied for vehicle finance at a company that had ties with the respondent and that by extension the respondent ought to have known about the changed address. I find this to be far fetched.

[8] As was stated in the judgment, the applicant did not specify the rule in terms of which application for rescission of judgment is relied upon, by him. The applicant adopted a posture that all the approaches were applicable in the alternative. For that reason the court was under obligation to deal with each one of those. This meant that the next issue up for determination was whether there was sufficient and/or good cause shown by the applicant, for the rescission. The onus rested upon the applicant for rescission to establish that good cause exists according to the circumstances of each case. The courts have in the past shied away from defining the concept 'good cause', since doing so would hamper the exercise which the rules have purposely made very extensive. 'Good cause' cannot be satisfied, unless there is at the very least, evidence firstly, that a substantial defence exists, and secondly, that the applicant has a bona fide desire to raise the defence should the application be granted. ***Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd 2011 (3) SA 477 (KZN).*** The requirements were adequately dealt with in the judgment against which the applicant seeks leave to appeal.

[9] The defenses that the applicant intimated were to be raised at the trial and in respect of which he was of the view that there were prospects of

success were the following;

9.1. The *causa* of the debt. He stated that he owed nothing to the respondent since no money was withdrawn or deposited into the account. Further that only interest was charged against the account.

9.2. That the claim had prescribed.

9.3. That the claim was not in accordance with the National Credit Act owing to the transaction being reckless and vexatious. The applicant further, in relation to the National Credit Act, stated that he did not receive the section 129 letter.

[10] In the founding affidavit the applicant stated that through his attorneys he was able to uplift a section 129 letter which purported to have been sent by registered mail. It is this letter that the applicant claimed to not have received. In paragraph 6.2 of the founding affidavit applicant states that he will deal with the aspect of the section 129 letter later in the affidavit when discussing the background of the matter. A proper reading of the affidavit reveals that the applicant does not discuss the section 129 letter under the background heading. He does so in paragraphs 10 and 11 of the founding affidavit, where the thrust of his argument is that the respondent had been aware of his changed address but nevertheless sent the 129 letter to a wrong address. The respondent on its part stated in paragraph 14 of their answering affidavit that a section 129 letter was not only sent but was collected at the registered address. Significantly, in reply to this the applicant replied and stated that *"I take note of the fact that the respondent sent a letter in terms of section 129 and 123 of the National Credit Act to a post box number being PO Box 146, Randparkrif, 2156".*

[11] The starting point of the submission by the applicant was to the effect that he did not receive the 129 letter. When evidence was brought forward to indicate that the section 129 letter was sent to the correct address, and collected by someone at the post office, he changed tack and argued that the amount on the letter differed with an amount on another letter. It is this lack of candor and forthrightness that led the court to conclude that there was nothing wrong with the section 129 letter given its contents and the fact that it was sent to the correct address and collected therefrom particularly in circumstances where the applicant simply "took note" of the delivery to the correct address and the collection from the post office. As a ground of appeal this aspect carries no reasonable prospects of success.

[12] The applicant states in paragraphs 3.2. through to and 3.10. what he believes to be erroneous findings. In the judgment, no such findings were made, at the very least, not as they appear in the aforesaid paragraphs. There is no finding in the court's judgment to the effect that the National Credit Act is not applicable. The applicant had argued that there was reckless credit. In the judgment the court dealt with the fact that the National Credit Act came into operation after the transaction was concluded. The NCA defines what a pre-existing agreement is. The court found that the agreement falls under the category of pre-existing agreement and that it would not be competent to assess the agreement on the basis that credit was advanced in a reckless manner. The court further went on to state that there must be compliance with section 129 and pronounced its satisfaction that there was adequate compliance with the provisions thereof. There was no finding in the judgment that the NCA is not applicable.

[13] In his founding affidavit the applicant made a passing reference to prescription. Under the heading *"Bona Fide Defence",* the applicant stated the following;

> *"As explained above is the fact that I owe nothing to the Respondent since no money where deposited and/or withdrawn out of the account. I also did not receive any money from the Respondent. It seems as if it is only interest that was charged against this account. It is further evident that the Respondent's claim has prescribed. If not the claim of the Respondent is in accordance with the National Credit Act, act 34 of 2005 reckless credit."*

Other than the aforementioned passing reference to prescription, there was no substantiation of what was contended in the papers in relation thereto. The applicant is now arguing that the court erred in finding that prescription would have begun to run on 16 May 2017. The applicant goes further to submit in the notice of application for leave to appeal that the court arrived at the conclusion having relied on argument before court only. Such a submission is incorrect. The respondent dealt with prescription in the answering affidavit (page 84 of the pagination papers). The court noted in its judgment that the applicant failed to state the basis for the contention that the claim by the respondent had prescribed. It is my view that another court will not find otherwise.

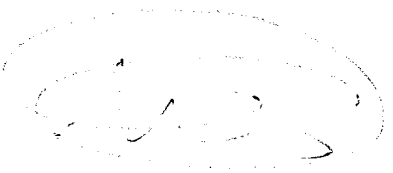
[14] The next ground of appeal relates to the change of address of the applicant. The applicant submitted that another court might find that in applying for vehicle finance with the MFC, a separate entity, the applicant notified the respondent of the change of address. The relationship between the parties was contractual and placed a duty on the applicant to notify the respondent of any change of address. The

applicant does not dispute that there was a duty on him to notify the respondent of the change of address. His contention is that in applying for finance at MFC, he discharged such a duty because MFC is part of a group of companies belonging to the respondent. I disagree. It is self evident that terms of the agreement for vehicle finance with MFC can not be extended to apply to the overdrawn account when it was not the intention of the parties that it be so.

[15] For all the above reasons, I am not persuaded that the appeal has prospects of success.

[16] I therefore make the following order;

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



SA THOBANE

ACTING JUDGE OF THE HIGH COURT