IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 23427/2010

DATE: 22 MARCH 2011

In the matter between:

STANDARD BANK OF SOUTH AFRICA Plaintiff

and

G W KELLY 1st Defendant

D B KELLY 2nd Defendant

J U D G M E N T

Application for Leave to Appeal

BINNS-WARD, J:

In a judgment delivered on 25 January this year, I granted summary judgment in favour of the plaintiff against the defendants. The defendants have applied for leave to appeal against the whole of that judgment. The test in respect of applications for leave to appeal is well established. I am

required to consider, in determining this application, whether there is a reasonable prospect that another court might, on appeal, come to a determination different to that reached by this court.

The position with regard to the assessment and determination of a summary judgment application is well established. The test is whether the defendant has set out in its opposing affidavit what is referred to as a *bona fide* defence. A *bona fide* defence entails more than the allegation of matter, which on its face would amount to a defence. It requires, in order for the *bona fides* requirement to be satisfied, the setting out of sufficient factual allegations to persuade the court that the defence raised, is raised not only in name, but in substance.

I dealt in some detail at paragraph 11 of the principal judgment with the relevant allegations made in the opposing affidavit by the defendants. For the reasons set out in my judgment, those averments do not satisfy the *bona fides* requirement and I am not persuaded that there is a reasonable prospect that another court could hold otherwise. Mr De La Rey today argued that an aspect of this case, which might nevertheless mitigate in favour of granting leave to appeal, is the relative novelty of the reckless credit "defence" in the context of the National Credit Act.

Whereas it must be conceded that there is a relative absence of jurisprudence on that aspect, another court would only get to the stage of having to consider the substance of that defence in the statutory context, once it was satisfied that the defendant had satisfied the requirements to oppose a summary judgment application by setting out sufficient facts. The defendants would not get out of the starting blocks if they did not establish *prima facie* that there had been a reckless extension of credit in regard to this credit agreement. In order to do that, they would have to lay a factual basis for it. As I set out in the principal judgment, they failed to do so.

I furthermore do not consider that another court could find that I had misdirected myself in the exercise of the residual discretion in terms of Rule 32 to refuse summary judgment. **IN THE CIRCUMSTANCES, I AM IMPELLED TO REFUSE THE APPLICATION WITH COSTS**. It is so ordered.

BINNS-WARD, J

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