

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO.: 4064/2013

In the matter between:

FIRSTRAND BANK LTD trading as WESBANK

Plaintiff/Respondent

and

MLAMLI BALISO

Defendant/Applicant

Court:	Van Staden AJ
Date of Hearing:	23 October 2014
Date of Judgment:	21 January 2015
Application for leave to appeal:	23 March 2015
Date of Judgment (leave to appeal)	30 April 2015

APPLICATION FOR LEAVE TO APPEAL: JUDGMENT

INTRODUCTION

1. This is an application for leave to appeal against a judgment delivered on 23 January 2015 in an exception to the plaintiff's particulars of claim.
2. In this judgment I found for the plaintiff. The defendant's exception, as well as the prayer for dismissing the plaintiff's action and the alternative prayer for the postponement of the matter, were dismissed with costs.
3. The exception was heard on 23 October 2014 and on 12 December 2014 the following order was made:
 1. I find for the Respondent/Plaintiff and the Excipient/Defendant's exception is dismissed with costs.
 2. The reasons the for this order will be furnished at the request of either of the parties as provided for in Rule 49(1)(c) of the Uniform Rules of Court.



4. In court, after I made the order, the Excipient/Defendant enquired what the ruling was in respect of the prayer for a postponement. I stood the matter down and requested Mr Baliso and the representative for the respondent/plaintiff to see me in chambers. I thereafter withdrew the order that I had previously made. The judgment referred to above was then delivered on 21 January 2015, and the following order was made:

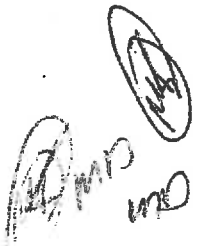
'I find for the plaintiff and the exception, the prayer for dismissing the plaintiff's action, as well as the alternative prayer for a postponement of the matter, are dismissed with costs.'

5. Thereafter on 9 February 2015, the defendant filed an application for leave to appeal. This application for leave to appeal was amended on 10 March 2015. In this amended application for leave to appeal the following was stated:

'PLEASE TAKE NOTICE THAT as the Defendant cannot appeal refusal of an exception, the Defendant hereby applies for leave to appeal to the full bench of the High Court of South Africa, Western Cape Division, Cape Town against only that portion of the judgment ... delivered on the 21st January 2015 in which it was held that sending a Statutory Notice in terms of Section 127(2) (b) of the National Credit Act 34 of 2005 by ORDINARY MAIL is sufficient and in compliance with the provisions of the NCA and therefore the Alternative Prayer was dismissed.'

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6. It was also alleged in this amended application that I was functus officio after the order was made on 12 December 2014 and that I was therefore not competent to deliver the judgment on 21 January 2015.
7. I agree with defendant/applicant that there is reasonable prospect that another court may differ from my interpretation of section 127(2)(b) of the NCA. Two further issues must, however, in my view, be considered:
 - 7.1 Whether I was competent to make the order on 21 January 2015;
and
 - 7.2 Whether the judgment dismissing an exception is appealable.
8. In respect of the first issue I am prepared to accept that I was functus officio when the order of 12 December 2014 was made. The further question, however, arises whether the order made on 21 January 2015 was competent or not.
9. The general principle is that once a court has duly pronounced the final judgment, it has no authority to alter or supplement it. However, in terms of Rule 42(1) of the Uniform Rules of Court and the common law, a judgment or order may be corrected, altered or supplemented under certain circumstances, more particularly, the following:
 - 9.1 An order or judgment in which there is an ambiguity or patent error or omission may be varied, but only to the extent of such ambiguity, error or omission (Rule 42(1)(b)).

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9.2 The principle judgment or order may be supplemented in respect of accessory or consequential matters that the court overlooked or inadvertently failed to grant;

9.3 The court may clarify its judgment or order if, on a proper interpretation, the meaning of it remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided that it does not thereby alter the 'the sense or substance of the judgment or order'. The order and the court's reason for given it must be read as a whole¹.

10. In this matter the order made on 15 December 2014 is, in my view, effectively the same order as the one that was made on 21 January 2015. In the judgment the different interpretation in respect of the notices under section 127 and 129 are fully dealt with. Section 130(3)(a) of the NCA specifically provides that the court may only determine a matter in respect of proceedings to which section 127 of the NCA applies, if the procedure required by section 127 have been complied with. In section 130(4)(b) it is furthermore stipulated that in the event of a credit provider not having complied with the provisions of the NCA as contemplated in section 130(3)(a), the court must adjourn the matter and make an appropriate order setting out the steps that the credit provider must take before the matter may resume². The postponement contemplated in section 130(3)(a) follows on a finding that section 127 has not been complied with. If section 127 has been complied with the matter cannot be postponed.

¹ Herbstein and Winsen *The Civil Practice of the High Courts of South Africa* 5th Ed Vol 1 para 3 p926-935

² In the judgment of 21 January 2015 reference erroneously made to section 30 and not 130

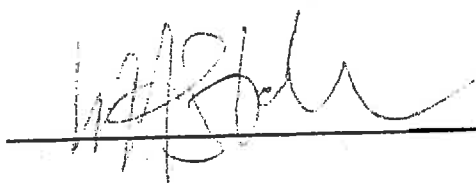
11. In the judgment of 21 January 2015 it was specifically mentioned that the plaintiff complied with the provisions of the NCA and that there is no basis for the matter to be postponed. In all the circumstances it is in my view clear that the order of 21 January 2015 merely supplemented the order of 15 December 2014. There is no question of any amendment. The dismissal of the exception on 12 December 2014 by implication entailed that there was no question of postponing the matter.
12. As far as the second issue is concerned, the defendant/applicant apparently contends that the application for leave to appeal relates to the dismissal of the alternative prayer for a postponement and not the exception. It is, however, clear from the facts stated above, that the alternative prayer for a postponement is interlinked with the exception and, in my view, without any final effect.
13. It has been held that an order dismissing an exception is interlocutory in effect and that the dismissal of an exception is not appealable³.
14. In section 17(1)(c) of the Superior Courts Act 10 of 2013 it is specifically provided that leave to appeal may only be granted where the judge concerned is of the opinion that, in instances where the decision sought to appeal 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 parties.
15. In my view there is no question of the appeal in this instance leading to a just and prompt resolution of the real issues between the parties. As far as

³ Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa* (5th Ed) Vol 2 p1210-1211; *Blaauwbosch Diamonds Limited v Union Government Minister of Finance* 1950 AD 599 and *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 SCA



I can determine from the pleadings, the question of compliance with section 127(2) of the NCA, is not the only issue. The real issues are the terms of the agreement between the parties and the question whether the goods in question were repossessed. In respect of the issue of the interpretation of section 127(2) of the NCA the parties may perhaps be in a position to present background information that will be relevant to the interpretation of this section. The judge hearing the matter in due course will not be bound by my interpretation of section 127(2) at this interlocutory stage.

16. In all the circumstances I conclude that there is no reasonable prospect of success on appeal and the application for leave to appeal is therefore dismissed with costs.



WH VAN STADEN

Acting Judge of the High Court

