



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 34171/2021

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

17 July 2023
DATE

PJ Malindi
SIGNATURE

ASSETLINE SOUTH AFRICA (PTY) LTD
(Registration number: 2009/021933/07)

Applicant

and

M BROTHERS XY GROUP (PTY) LIMITED
t/a AFRICAN ENGINEERING TECHNOLOGY INSTITUTE
(Registration number: 2015/39841/07/07)

First Respondent

DANIEL MOTSHUTSHI MTIMKULU

Second Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 July 2023.

LEAVE TO APPEAL JUDGMENT

MALINDI J

Introduction

- [1] On 11 March 2022 I granted an order for payment of R1 100 000.00 with interest of 5% per month compounded monthly in arrears from date of judgment and declaring certain property owned by the second respondent in the main application specially executable.
- [2] Demand of payment had been made against the respondents on 26 March 2020 for the amount of R688 285.29 in the full loan amount which had been calculated with interest at 3.25% per month from date of the loan on 7 February 2020. The loan was for R550 000.
- [3] On 8 July 2022 the respondents in the main application applied for leave to appeal against the order, together with an application for condonation of the late application for leave to appeal.
- [4] The parties shall be referred to as in the main application.

Merits

- [5] On 9 March 2022 the respondents filed an application for postponement of the application set down for 9 March 2022. The purpose of the postponement was to enable the respondents to file a supplementary affidavit. The reason therefor was that the answering affidavit had been drafted by a lay-person, being the second respondent, and an affidavit prepared by lawyers "*in order to make a sound opinion*" was required. As to addressing the issue of prejudice, the respondents state merely that the applicant will not suffer prejudice as a result of the postponement.

- [6] The applicant opposed the postponement. Having considered the application, it was dismissed. The respondents' legal representatives immediately withdrew from the matter as they only had instructions to apply for a postponement and not to deal with the merits. The matter then proceeded without the respondents being represented and the order granted on 11 March 2022 is being sought to be appealed.
- [7] As stated above, the order was granted on 11 March 2022 and the application for leave to appeal was launched only on 8 July 2022. Condonation for the late filing of this application is sought. The 15 days' time frame within which the application ought to have been brought in terms of Rule 49(1) of the Uniform Rules of Court has been inordinately exceeded.
- [8] Although it was submitted on behalf of the respondents that part of the reasons for the delay in applying for leave to appeal is that the order was granted without reasons and that such reasons were not forthcoming even after requests were made therefor it is apparent from the condonation application that the thought or idea to appeal only arose in June 2022 when the respondents received notice of the sale in execution. By then the 15 day period had long lapsed.
- [9] As Mr Mosikili, for the respondents, stated in argument for leave to appeal, the purpose for the supplementary affidavit is to set out the respondents' defences to the main application, and/or to supplement those that were not fully set out in the second respondent's affidavit.
- [10] In the answering affidavit the second respondent, Mr Mtimkulu, had listed the following as his defences:

10.1. The levying of 5% interest per month from 1 June 2021 was not in accordance with the 3.25% in terms of the Agreement between the parties.

10.2. The respondents had been meeting their obligations sporadically until the first respondent's business was affected adversely by the onset of the COVID-19 pandemic.

10.3. The property is Mr Mtimkulu's primary residence.

[11] At the hearing all these defences were addressed by the applicant and I was satisfied that the respondents should fail on all of them. The answering affidavit, with annexures thereto, was considered. The replying affidavit dealt with the application of the two interest rates of 3.25% and 5% especially that 5% would apply from date of breach of the agreement in terms of clause 6.1 thereto.

[12] As to the question whether Mr Mtimkulu would be rendered homeless the replying affidavit referred to clause 6.5 wherein the respondents warranted that the property is not a primary residence. The applicant was entitled to rely on this warranty unless the Agreement had been validly amended. In addition, it was submitted that Mr Mtimkulu owns two other properties in Cape Town which could be used as a residence if indeed the property which is a subject of these proceedings were his residence, or use them to acquire a residence in Johannesburg.

[13] As to the application of the *in duplum* rule, the applicant had taken that into account when relief was sought only for payment of R1 100 1000.00, an amount

twice the loan amount of R550 000.00. It was submitted that *in duplum* would be reached even on the application of the 3.25% interest. This is set out in paragraphs 8 to 14 of the applicant's heads of argument. The amount sought to be rendered as interest does not double the original debt.

[14] A reserve price was not set in the order granted because the property is not a primary residence and no factors were averred in the answering affidavit why a reserve price should be set nevertheless.

[15] Lastly, it was not contended in the answering affidavit that Mr Mtimkulu's ex-wife or partner was a co-owner of the property. If it were so, and the applicant had not joined her to the proceedings it still fell on the respondents to seek such joinder. They did not do so. The "plea" of non-joinder is only raised at the leave to appeal stage, and in the unadmitted supplementary affidavit.

[16] The respondents submitted that had a postponement been granted they would have filed a supplementary affidavit wherein they "*would have demonstrated, inter alia, that the provisions of the National Credit Act are applicable in this matter...*". If it be so, in the absence of such supplementary evidence the prospect of success on appeal is reduced to lack of such prospect. Such evidence could not be proffered from the Bar as Mr Mosikili attempted to do.

Conclusion

[17] The test for leave to appeal is whether "*the appeal would have a reasonable prospect of success*" or whether "*there is some other compelling reason why the appeal should be heard...*". The refusal of the postponement excluded the

respondents' intent to file a supplementary affidavit for purposes of providing further defences and supplementing defences already provided by the second respondent. Such defences could not be provided from the Bar as Mr Mosikili sought to do. As a result, I am of the opinion that the appeal would have no prospects of success without this further evidence that the respondents sought to introduce. I am of the opinion further that there were no misdirections on either the facts or law in granting the order of 11 March 2022 based on the evidence then before court. The appeal would have no prospect of success in that respect too.

[18] In these circumstances, the following order is made:

1. The application for leave to appeal is dismissed.
2. The applicants for leave to appeal or to pay the costs.

PJ Malindi

G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

APPEARANCES

COUNSEL FOR APPLICANT:
 INSTRUCTED BY:

Adv JM Hoffman
 Swartz Weil van der Merwe
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 INSTRUCTED BY:

Adv T Mosikili
 Isaac Attorneys

DATE OF THE HEARING:
DATE OF JUDGMENT:

23 November 2023
17 July 2023