

IN THE HIGH COURT OF SOUTH AFRICA

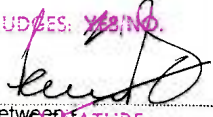
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES ☐ NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES ☐ NO.

(3) REVISED. ☒ YES ☐ NO.

DATE 30/7/10 In the matter between  SIGNATURE

CASE No. 33047/2008

30/7/2010

SYDNEY MUDLAZAKHE DHLAMINI

Applicant

and

NEDBANK LIMITED

First Respondent

LOUIS MALAPO

Second Respondent

HARVEY NORTJE

Third Respondent

SHERIFF OF THE HIGH COURT, WITBANK

Fourth Respondent

REGISTRAR OF DEEDS

Fifth Respondent

JUDGMENT : APPLICATION FOR LEAVE TO APPEAL

Van der Byl, AJ:-

[1] In this matter I on 2 June 2010 delivered judgment in which I dismissed with costs an application by the Applicant launched on 19 May 2010 for the rescission and setting aside of a judgment granted by default by the Registrar under Case No. 23047/08 on 19 September 2008.

.../...

[2] The Applicant now seeks leave to appeal against my judgment and order dismissing the Applicant's application.

[3] In the Applicant's Notice of Applicant's Application for Leave to Appeal ("*the Notice*") it is contended that I erred or misdirected myself -

- (a) in dismissing the Applicant's application, notwithstanding the Applicant having disclosed a *bona fide* defence and having given a reasonable explanation for its failure to enter an appearance to enter an appearance to defend;
- (b) in not *mero motu* setting aside the default judgment granted in view of there having been defective improper service of the summons of the summons commencing action, notices and letters to the Applicant;
- {c} in failing to find that the Respondent willfully used incorrect addresses which had the effect of notices and letters not being brought to the attention of the Applicant;
- (d) in failing to consider the caution expressed by the Sheriff that the documents were not being properly served;
- (e) in failing to find that it was not just and equitable that the Applicant's immovable property be sold for an arrear amount of R1800;

- (f) in failing to properly applying the principles in ***Jafta v Schoeman 2005(2) SA 140 (CC)***;
- (g) in affirming a sale of the Applicant's home for a trifling debt and without the Court having regard to all the relevant circumstances;
- (h) in failing to find that the Respondent ought to have called up its surety with Matla Coal Limited which stood surety for the indebtedness of the Applicant to the First Respondent.

[4] It is apparent that in none of these grounds which consist of contentions that I either erred in having made certain findings or that I failed in not making other findings, is a single reason advanced as to why it is contended that I so erred or so failed.

[5] In this regard I wish to point out, as I have, referring to various decisions, indicated in many judgments delivered in this regard in various Divisions, that notices in which no reasons are advanced on which grounds of appeal are based do not comply with the provisions of Rule 49 and cannot be accepted as valid notices (See: ***Tzouras v SA Wimpy (Pty) Ltd 1978 (3) SA 204 (W) at 205E; S v Maliwa and Others 1986 (3) SA 721 (W) at 726E; Molebatsi v Federated Timbers (Pty) Ltd 1996 (3) SA 92 (B) at 94I; and Songomo v Minister of Law and Order 1996 (4) SA 384 (ECD) at 385I***).

[6] In the ***Songomo case, supra***, at **385I** it was, for instance, held as follows:

"It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal."

[7] In ***Van der Walt v Abreu 1999(4) SA 85 (W)*** the learned Judge dealt with the requirements for a valid notice of appeal in terms of Rule 51 of the Magistrate's Courts Rules (which in my opinion equally apply to Rule 49 of the Uniform Rules) at **94E** as follows:

"(1) It must specify the details of what is appealed against (ie the particular findings of fact and rulings of law that are to be criticised on appeal as being wrong); and

(2) it must also state the grounds of appeal (ie it must indicate why each finding of fact and ruling of law that is to be criticised as wrong is said to be wrong,

Only when both of these requirements have been set out in a notice of appeal has a valid ground of appeal been disclosed according to the language of the Rule. "

[8] In my view the Notice filed in this matter falls short of these requirements and may be considered to be an invalid one.

[9] In the event of I am being wrong on the validity of the Notice, I proceed to deal with the question as to whether there are reasonable prospects of success on appeal.

[10] As is apparent from my judgment the matter was approached on the question as to whether the Applicant has disclosed a *bona fide* defence.

[11] As is likewise apparent from my judgement it is the Applicant's case that his account with the First Respondent was, notwithstanding his contentions that he arranged with the Mineworkers Provident Fund that monies due to him be used to pay off his bond, indeed in arrears in an amount in excess of R20 000 (I may add that the allegation that his indebtedness amounted to R47 873, together with interest of R4 787,30, was not disputed).

[12] As is also apparent from my judgement the only submissions advanced in support of the Applicant's application are -

- (a) that, relying on the decision in *Jafftha v Schoeman; Van Rooyen v Stoltz 2005 (2) SA 140 (CC)*, the property was sold when a minuscule amount of approximately R3 000 was in arrears without taking into consideration the Applicant's personal circumstances;
- (b) that the First Respondent sold the property instead of acting against Matla Coal Ltd which stood surety for the Applicant's indebtedness.

[13] For the reasons set out in my judgement the facts of this matter are clearly distinguishable in many respects from the situation with which the Constitutional Court was faced in the *Jafftha case* as was, incidentally, pointed out by the Constitutional Court itself at *162E, para [58]* which is, furthermore, confirmed by the Supreme Court of Appeal in *Standard Bank of SA Ltd v Sanderson 2006 (2) SA 264 (SCA) at 269B* and explicitly held in *Nedbank Ltd v Mortinson 2005 (6) SA 462 (W)*.

[14] In relation to the contention that the First Respondent should rather have acted against the surety, I am not aware of any principle or authority and my attention was not directed to any such principle or authority that a bond holder is in any circumstances bound to act against a surety first or at all.

[15] Mr. Bhamjee who appeared on behalf of the Applicant in this application, indicating that he does not abandon any of the other grounds of appeal raised in the Notice, relied mainly on the contention that I erred in not having *mero motu* granted the Applicant's application in view of there having been defective improper service of the notices referred to in sections 129 and 130 of the National Credit Act, 2005.

[16] Although it is contended by the Applicant in his affidavit filed in support of his Application for rescission of the default judgment that he did not receive "*any letters from the 1st respondent stating that (his) account was in arrears or that demand is made for payment in terms of the National Credit Act*", this is an issue not argued in the proceedings *a quo*. I fail to see on what basis I should have approached this issue *mero motu*, particularly, where no allegation of over-indebtedness is made. As a matter of fact it was the Applicant's case that he did have the money to pay his indebtedness, but that his provident fund failed at his request the money over to the First Respondent.

[17] It is accordingly clear to me that this ground of appeal is, if not of a mere technical and unrealistic nature, nothing but an afterthought.

[18] I am accordingly unpersuaded that another Court may come to a conclusion,

irrespective the Applicant's explanation for his default of appearance, that the Applicant disclosed a *bona fide* defence.

In the result the application for leave to appeal is dismissed with costs.



P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT

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On the instructions of

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ON BEHALF OF THE FIRST RESPONDENT

ADV J H WILDENBOER

On the instructions of

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DATE OF HEARING

27 July 2010

JUDGMENT DELIVERED ON

30 July 2010