

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION BLOEMFONTEIN**

Case no.: 3949/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD

(Reg. no:19[....]06)

Applicant/Respondent

and

CHRISTOFFEL PETRUS WOLMARANS N.O. 1st Respondent/Applicant

EMERENTIA WOLMARANS N O.

2nd Respondent/Applicant

TELLA HARRIS N.O.

3rd Respondent/Applicant

VANWYK WOLMARANS N.O.

4th Respondent/Applicant

(First to Fourth Respondents in their
capacity as duly authorised trustees of the
WOLMARANS KINDER TRUST, IT 9[....]8)

CHRISTOFFEL PETRUS WOLMARANS

5th Respondent/Applicant

(Identity number: 5[....]1)

EMERENTIA WOLMARANS

6th Respondent/Applicant

(Identity number: 5[....]7)

CORAM: VANZYL, J

HEARD ON: 17 OCTOBER 2022

DELIVERED ON: 17 APRIL 2023

[1] This is an application for leave to appeal by the first to sixth respondents against the whole of the judgment and order of Daffue, J delivered against the respondents on 16 May 2022.

[2] This application was allocated to me on the basis of the provisions of section 17(2)(a) of the Superior Courts Act, 10 of 2013 ("the Act"), in terms whereof an application for leave to appeal may be heard by any other judge of the Division when the judge against whose decision the appeal is to be made, is not readily available. At the time of the hearing of the present application, Daffue, J was acting in the Supreme Court of Appeal.

[3] Section 17(1)(a) of the Act determines as follows:

"1. Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (a)(i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b)

[4] In the judgment of **Acting National Director of Public Prosecutions v Democratic Alliance In Re Democratic Alliance v Acting National Director of Public Prosecutions** (19577/09) [2016] ZAGPPHZ 489 (24 June 2016) the court held at para [25] of the judgment that the Act has raised the bar for granting leave to appeal and in this regard it referred to the judgment of **The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others** 2014 JDR 2325 (LCC), in which judgment the court held as follows at para [6]:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

See also **Njango v S** (06/2016) [2018] ZAFSHC 17 (27 February 2018) at paras [7] - [8] and *Rohde v S* 2020 (1) SACR 329 (SCA) at para [8].

[5] With regard to the test of "reasonable prospects of success" the well-known dictum in *S v Smith* 2012 (1) SACR 567 (SCA) at para [7] is still applicable.

[6] I will refer to the parties as in the main application.

[7] In the main application the applicant applied for judgment against the respondents for payment due in terms of three accounts, as well as orders in terms whereof several immovable properties be declared especially executable, based on settlement agreements concluded between the parties, which had previously been made orders of court.

[8] The Respondents opposed the main application and also filed a counter application in terms whereof they sought the dismissal of the main application, in the alternative they, inter a/ia, sought the following relief:

1. Declaring both settlement agreements void by virtue of the provisions of section 89, read with sections 90 and 164 of the National Credit Act, 34 of 2005 ("the NCA").
2. In the alternative, declaring those provisions of the settlement agreements that offend section 90 of the NCA as void.
3. In the further alternative, declaring that the settlement agreements are reckless and setting aside all or part of the respondents' rights and obligations under the settlement agreements in terms of section 83 of the NCA, alternatively, an order in terms of section 83(3) of the NCA.
4. Setting aside of the two court orders premised upon the first and second settlement agreements.

[9] The grounds of appeal as set out in the first to sixth respondents' notice of application for leave to appeal are lengthy and detailed. It was very thoroughly drafted setting out the findings of the court which underpinned and/or influenced the judgment and order and beneath every finding the reasons upon which the respondents base their submission that the court erred. I do not consider it apposite to repeat all of the aforesaid herein. However, in order to get an impression of the nature of the proposed appeal, I will, set out the findings made by the court a quo against which the proposed appeal will be directed, as recorded in the notice of application for leave to appeal, as well as a few of the reasons therefore advanced by the respondents:

"3.

THE TWO SETTLEMENT. AGREEMENTS ARE UNLAWFUL, NOT SUBJECTED TO THE NCA AND ACCORDINGLY NOT TO BE SET ASIDE:

The court should have found that the settlement agreements are unlawful and void and thus to be set aside alternatively, if not void in toto, that they, alternatively, the remainder of the provisions not set aside, are subjected to the provisions of the NCA.

3.1 In regard to the fifth respondent's underlying credit facility regulated by the NCA the court erred by:

3.1.1 not finding that these settlement agreements constitute supplementary agreements and are accordingly unlawful in terms of s89(c);

3.1.2 not finding that the settlement agreements are, by virtue of the provisions of ss89(2)(c), 91(2) and 90, read with the applicable provisions of the NCA, unlawful;

...

4.

THE JUDGMENTS BY DEFAULT ISSUED ON THE BACK OF THE TWO SETTLEMENT AGREEMENTS ARE IN ORDER AND THERE EXISTS NO REASON FOR THE RESCISSION THEREOF:

The court should have found that, on account of the unlawful settlement agreements read with the Respondents' evidence and submissions pertaining to the non-existence of a lawful causa, non-compliance of a due and proper process and also unfulfilled contractual provisions, that the judgments given on the back of the settlement agreements should be rescinded, inter alia,

...

5.

THAT PRECEDENCE BE GIVEN TO THE SETTLEMENT OF DISPUTES BETWEEN PARTIES EVEN AT THE COSTS OF PART D OF CHAPTER 5 OF THE NCA:

5.1 In the context of the judgment as a whole, as well as the reference to the Ratlou-decision, the court erred by having implied that ultimate preference to the settlement of disputes is to be given even if the regulatory process provided for by legislation is to be disregarded: This conclusion is incorrect by virtue of the provisions of part E of Chapter 5, which, as a matter of law, firstly facilitates alterations to credit agreements such as the facility agreement concluded by the fifth respondent and, secondly, could have been applied in the current matter without having stood in the way of a lawful settlement.

...

6.

THE DEFENCES OF THE SURETIES: THE APPLICATION AND INTERPRETATION OF S8(4)1 READ WITH THE MOSTERT- AND CARL BECK ESTATES DECISIONS:

6.1 The court erred by not holding that, taking into account the fact that the underlining credit facility of the fifth respondent is regulated by the NCA, the sureties are entitled to rely upon all the defences (excluding personal defences) that the fifth respondent was entitled to have relied upon.

...

7.

THAT THE NCA IS NOT APPLICABLE IN CASU:

7.1 ... It could never have been the legislature's intention to allow credit providers, unscrupulous or not, by the mere conclusion of a so- called settlement agreement - that is, by the stroke of a pen - escape the tentacles of the NCA.

...

8.

APPLICATION AND IMPLEMENTATION OF THE PLASCON-EVANS RULE:

The court should have applied this rule even-handedly and not only in a way favouring the applicant, by inter alia:

...

9.

THE REJECTION OF THE EVIDENCE ADVANCED BY THE RESPONDENTS AND THE ACCEPTANCE OF THE APLPICANT'S EVIDENCE:

...

10.

THE REJECTION OF THE REMAINDER OF THE COUNTER APPLICATIONS:

...

11.

BIASNESS AND HOSTILITY OF COURT:

...

12.

THE COURT'S DISREGARD OF THE FAILURE BY THE APPLICANT TO HAVE APPLIED THE PROCEDURES REQUIRED BY SECTIONS 129 AND 130 OF THE NCA:

..."

[10] I have thoroughly considered the main application and the counter application, the parties' respective heads of argument filed therein, the notice of application for leave to appeal and the judgment of Daffue, J. In addition, counsel thoroughly addressed me on the merits of the application for leave to appeal during the hearing thereof. Mr Snellenburg, SC appeared on behalf of the respondents, who are the applicants in the application for leave to appeal, and Mr (P) Zietsman SC, assisted by Mr Els, appeared on behalf of the applicant, who is the respondent in the application for leave to appeal.

[11] The crux of the judgment turns on the interpretation of certain sections of the NCA, read in conjunction with certain applicable case law. In the process it pertinently dealt with the question whether the two settlement agreements are subject to the provisions of the NCA, or not. In the process the court also dealt with the question whether, in an instance where the underlying facility is regulated by the NCA, a subsequent settlement agreement constitutes a supplementary agreement in terms of the NCA.

[12] I presided over an application similar to the present main application and counter-application. Although there may be factual differences in respect of certain aspects between the application I dealt with and the present application, which may impact upon the relevant questions of law, I had to make similar determinations with regard to the interpretation of the NCA. I delivered judgment in the matter of

Serfontein and 1 Other v Absa Bank Ltd and 3 Others, application number 4659 /2021, which judgment was delivered on 22 March 2023. My most important findings therein contradict the findings made by Daffue, *Jin casu*.

[13] I am of the opinion that the proposed appeal has a reasonable prospect of success and furthermore that the aforesaid Serfontein-judgment and the judgment in *casu*, in my view, constitute "conflicting judgments of the matter under consideration" as determined in section 17(1)(a)(ii) of the Act. I am consequently of the opinion that in addition to the prospects of success, there is a compelling reason why the appeal should be heard.

[14] In terms of section 16(1)(a)(i) of the Act the proposed appeal lies either to the Supreme Court of Appeal or a full court of this Division, depending on the direction issued in terms of section 17(6). Section 17(6)(a) of the Act determines the following:

(6) (a) If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal."

[15] Mr Snellenburg submitted and requested that leave to appeal to the Supreme Court of Appeal should be granted. Mr Zietsman, on the other hand, submitted and requested that should leave to appeal be granted, such leave is to be granted to appeal to the full court of this Division.

[16] In my view the questions of law involved in the proposed appeal are of utmost importance because of its general application and that the administration of justice, generally, requires consideration of the judgment in casu by the Supreme Court of Appeal.

[17] Mr Zietsman submitted and that should I grant leave to appeal, it should only be in relation to paragraph 1.1 of the order and not include paragraphs 1.2 and 1.3 of the order. I, however, agree with the submission of Mr Snellenburg that the facts are entwined and that it will consequently not be apposite to grant leave to appeal only on part of the order.

[18] With regard to the costs of this application for leave to appeal, there is no reason why the usual order that costs be costs in the appeal, should not be ordered.

Order:

1. The applicants in the application for leave to appeal/the respondents in the main application are granted leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order of Daffue, J delivered on 16 May 2022.

2. The costs of the application for leave to appeal are costs in the appeal.

C. VAN ZYL, J

On behalf of the applicants

in the leave to appeal/the respondents

in the main application:

Adv. N. Snellenburg SC

Instructed by:

Blair Attorneys

BLOEMFONTEIN

On behalf of the respondent
in the leave to appeal/the applicant

in the main application:

Adv. P. Zietsman SC

Assisted by:

Adv. J. Els

Instructed by:

Phatshoane Henney Inc

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