



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **1957/2020**
Heard: **04/11/2021**
Delivered: **19/11/2021**

In the matter between:

EUBRAIM JOHN CROUCH

Applicant

and

FIRST RAND BANK LTD t/a WESBANK

Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Mamosebo J

- [1] This is an opposed application for leave to appeal to the Full Bench of this Division against the whole of my judgment and order granted on 06 August 2021.
- [2] In his Notice of Application for Leave to Appeal filed with the office of the Registrar on 30 August 2021, the applicant raised what seems to be about 12 grounds of appeal which, in relevant parts, can be categorised under three grounds:

- 2.1 That the Court had erred in finding that the applicant lacked *bona fides*;
- 2.2 That the Court had misdirected itself in its finding that a proper assessment was conducted; and
- 2.3 That the Court had erred in finding that the applicant failed to fully disclose his financial interest or to find that such non-disclosure did not materially affect the ability of the respondent to conduct a proper assessment.

[3] The test for an application for leave to appeal is governed by section 17(1) of the Superior Courts Act¹, which has raised the threshold of the test for leave to appeal. The applicant must demonstrate to the Court that there are reasonable prospects that the appeal would succeed. Our courts have already interpreted the phrase “would”, found in section 17(1)(a)(i) of the Act, as indicative of some form of certainty or realistic chance of success². The applicant brought this application in terms of s 17(1)(a)(i) alleging reasonable prospects of success.

[4] The premise moved from is that the main application sought the rescission of a default judgment granted against the applicant. In accordance with *Chetty*³ the *onus* rested on the applicant to establish sufficient cause. See paras 5 and 6 of the main judgment. Whilst conceding on the one hand that that he had a hard row to hoe as a result of the applicant’s failure to defend the action, Mr Groenewaldt, arguing for the applicant, merely skimmed through this aspect without giving any explanation for such failure. He invoked

¹ 10 of 2013

² The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) at para 6; MEC for Health, Eastern Cape v Mkhitha and Another [2016] ZASCA 176 (25 November 2016) at paras 16-17 and Notshokovu v S [2016] ZASCA 112 (7 September 2016) at para 2

³ Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764J – 765D

the case of *Harris*⁴ in submitting that this Court should not consider such failure to justify the default in isolation. In dealing with the applicable principle *Mosenek J*, then, stated at para 4:

"(4) *This application for rescission of judgment was brought under the common law. The applicant, being the party which seeks relief, bears the onus to establish "sufficient cause". Whether or not "sufficient cause" has been shown to exist depends upon whether:*

(1) The applicant has presented a reasonable and acceptable explanation of her default; and

(2) The applicant has shown the existence of a bona fide defence, that is one that has some prospect or probability of success (see Chetty v The Law Society, Transvaal 1985 (2) SA 756 (A) at 764J, 765A – D)."

[5] It is common cause that there was personal service or process of the summons on the applicant. He was aware of the intended action against him and the steps he needed to take to avoid the default, because they are clearly set out in the summons, including time frames within which to act. The applicant failed to furnish any reasonable or acceptable explanation of his default in the papers. That is what was found in the main judgment. For Mr Groenewaldt to argue otherwise on this aspect is demonstrative of merely going through the motions.

[6] The main judgment has, in my view, effectively dealt with the aspect of the assessment conducted by the respondent. Para 14 of the main judgment dealt with the submission by Mr Groenewaldt that, had the bank conducted a proper assessment, it would have realised that the applicant was over-indebted and would have declined his application. Mr Groenewaldt, referring to 'OA14', the applicant's

⁴ *Harris v Absa Bank Ltd t/a Volkskas* [2002] 3 All SA 215 (T)

affordability assessment and Consumer Bureau Profile conducted by the respondent, posed several questions: Why did the bank leave the expenses portion blank? Why the necessity of submitting the bank statements if the bank would not consider them? Was it realistic for the bank to accept that an amount of R2,000.00 was reasonable for living expenses in the current economic climate? How did the bank arrived at the buffer amount of R5,229.54? It was on that basis that Mr Groenewaldt submitted that it can reasonably be inferred that the respondent did not conduct a full, fair and reasonable assessment.

- [7] In countering the submissions by Mr Groenewaldt, Mr Van der Merwe, counsel for the respondent, took a different approach by pointing out that the applicant has not crossed the first hurdle of showing that good cause existed for the rescission of the judgment. No reasonable and acceptable explanation for the default was furnished; a finding made by this Court in the main judgment and not challenged in this application for leave.
- [8] The applicant contends that this Court made an error in its finding that the applicant lacked *bona fides*. Para 19 of the main judgment has dealt with this aspect but because it is raised afresh, I will repeat it. Whereas the instalment sale agreement was concluded on 18 October 2018 and the applicant took delivery and possession of the BMW and drove it for more than two years, it is only after he fell into arrears and the default judgment was granted against him after he had failed to defend the action, that he first raised the defence of over-indebtedness. I have not discerned anywhere in the papers where the applicant approached the bank after the favourable application to contest the approval of the credit.

- [9] To elaborate further on the aspect of *bona fides* it can be tied to the argument made on behalf of the applicant that it was not shown that his non-disclosure of other financial information materially affected the application. What the applicant seems to overlook, and which was pointed out in the main judgment, was the misrepresentation regarding his marital regime which, as reflected on 'OA14', resulted in his spouse's financial strength not being assessed. What deflates his argument is that he confirmed, by appending his signature thereto on 25 October 2018, that the entire contents of 'OA14' is true and may be forwarded to the credit providers on his behalf.
- [10] Mr Groenewaldt intimated that the applicant is a lay person and would ordinarily not have known that he had a defence until he had consulted his lawyer. Mr Van der Merwe was correct in his counter-argument on this aspect in that this is shifting the *onus*, because this is a factual argument and all the applicant needed to do was to present the facts to his legal representative who would then have advised him further. This aspect of the matter emanates from facts which are within the knowledge of the applicant.
- [11] Section 81(1) of the National Credit Act⁵ (NCA) which deals with the prevention of reckless credit provides:

*"81(1) When applying for a credit agreement, and while that application is being considered by the credit provider, **the prospective consumer must fully and truthfully answer any requests for information** made by the credit provider as part of the assessment required by this section."* (Own emphasis)

The credit provider must take reasonable steps before granting the consumer credit. We know from the papers that the respondent has

⁵ 34 of 2005

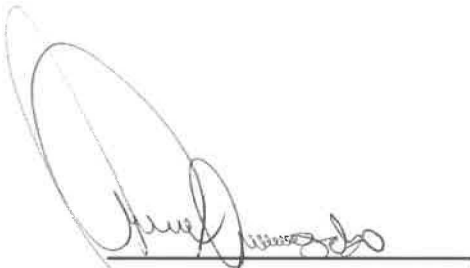
designed its mechanisms to assess the applicant as can be gleaned from para 22 of the answering affidavit. The applicant's disposable income and living expenses were considered; the applicant completed an income and expenses breakdown form ('OA9') and indicated therein that his total monthly expenses were R2,644.00; the applicant failed to disclose a home loan repayment in the amount of R8,013.00 and loan repayments of R1,283.00 which were discovered and considered by the respondent during its assessment; the respondent added a precautionary buffer in the amount of R5,229.54 to cater for unforeseen and undeclared expenses; after a recalculation, the applicant's total living expenses came to R17,265.54 (653% more than what the applicant had disclosed). The applicant's total disposable income came to R26,631.82 per month which is what the respondent used to grant him the credit. All these mechanisms satisfy the requirements of s 82(1) of the NCA, that the credit provider may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under s 81, provided the assessment is fair and objective. The respondent has, in my view, conducted a full, fair and reasonable assessment. What the applicant is doing now by bringing the same argument is nothing less than obfuscating.

- [12] Mr Groenewaldt argued with reference to s 81(4)(b) of the NCA that the Court did not pronounce whether or not the non-disclosure by the applicant has materially affected the ability of the credit provider to make a proper assessment, therefore this point adds to the prospects of the applicant's success on appeal. Mr Groenewaldt is clutching at straws here. The fact of the matter is that I was satisfied that the respondent had taken reasonable steps to assess the applicant.

[13] Having dispassionately considered each ground raised by the applicant in an effort to determine whether there are reasonable prospects that another court would come to a different finding than this court whose judgment is sought to be appealed against, I have not found any. In the result, the application for leave to appeal stands to fail.

[14] The following order is made:

The application for leave to appeal is dismissed with costs.

A handwritten signature in black ink, appearing to read 'M.C. Mamosebo', is written over a horizontal line.

M.C. MAMOSEBO

**JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the Applicant:
Instructed by:

Mr S Groenewaldt
Towell and Groenewaldt Attorneys

For the Respondent:
Instructed by:

Adv. HJ Van der Merwe
Symington De Kok Inc
c/o Mervyn Joel Smith Attorneys