REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A440/16

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

3rd Feb 2020

DATE SIGNATURE

In the matter between:

MONEYLINE FINANCIAL SERVICES (PTY) LTD **APPLICANT/APPELLANT**

And

THE NATIONAL CREDIT REGULATOR **RESPONDENT**

JUDGMENT APPLICATION FOR LEAVE TO APPEAL

COLLIS J (at al SENYATSI AJ):

INTRODUCTION

1. In the present application, the applicant is seeking leave to appeal an order[1] of this court upholding the point *in limine* of non-joinder and postponing the appeal *sine die*.

2. The application for leave to appeal is premised on the basis that this court erred in finding that the National Consumer Tribunal has a direct and substantial interest in any order that the court would make in these proceedings. Secondly, the applicant alleges that this court erred in finding (at paragraph 28 of the judgment) that it would be necessary for its judgement to bind the Tribunal by operation of the principle of res judicata. Thirdly, it is contended by the applicant that this court erred in accepting (at paragraph 29 of the judgment read together with the order of this court) that "....it has become practice in this Division that where a statutory body has made a decision which is the subject of an appeal that such statutory body ought to be cited as a party in the proceedings." Fourthly, the applicant alleges, that this court erred (in paragraph 29 of the judgment as read with the order) in concluding that the Tribunal had an interest in the appeal proceedings on account of the fact that the issue on appeal concerned the interpretation of the Act and the Tribunal Rules. Fifthly, the applicant alleges, that this court erred (in paragraph 30 of the judgment) in so far as any weight was attributed to the fact that "no additional argument in this regard was proffered in the heads of argument prepared on behalf of the appellant. In addition the applicant alleges that this court erred in finding (in paragraph 31 of its judgment) that, because the Tribunal is an entity separate

[1] Judgment Collis J (et al Senyatsi AJ) delivered 30 August 2019

from the National Credit Regulator (being the respondent in the appeal) it ought to be joined as a party in the appeal proceedings as the Tribunal would be bound by the determination of the Appeal Court. It is for the above reasons that the applicant contends that the precedent created by the judgment and order accordingly stands to be set aside by the Supreme Court of Appeal.

THE LAW

3. Section 17 of the Superior Court's Act provides as follows:[2]

"(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) the decision sought to appeal does not fall within the ambit of section 16(2)(a);

and

(c) where the decision sought to be appealed 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 the parties."

4. At the commencement of the proceedings, the court directed the parties to address it on the appealability of the court's decision with specific reference to

[2] Act 10 of 2013

the decision of Zweni v Minister of Law and Order 1993 (1) SA 523, more so, in that the order for the joinder of the Tribunal made by this court is interlocutory in nature.

THE ARGUMENTS

5. In this regard, Mr Fine on behalf of the applicant had conceded that an order for the joinder of a party is interlocutory in nature and does not have the effect of determining any substantive issues as between the parties already joined in these proceedings, namely, the applicant and the respondent in the present instance.

6. He had however submitted that this court's decision is appealable in terms of section 17(1) (c) quoted above, wherein the interest of justice would be served by the Supreme Court of Appeal pronouncing on the correct interpretation of section 148 of the National Credit Act and determining the issue of whether the Tribunal exercises judicial or administrative functions. In support of this submission the applicant had placed reliance on the decision of Nova Property Group Holdings v Cobbett.[3]

7. This issue as contended by Mr Fine, lies at the heart of the question whether the members of the Tribunal must be joined as parties before the appeal in terms of section 148 can proceed. He went on to argue that the decision (forming the subject-matter of the appeal), is judicial in nature as it relates to

[3] 2016 (4) SA 317 (SCA)

the determination whether its decision is right or wrong. It is for this reason that he considers that the joinder of the decision-makers (in this instance the Tribunal) is wholly inappropriate.

8. In opposition, Mr. Kutumela appearing on behalf of the respondent, argued that leave to appeal the court's decision should be refused as the decision sought to be appealed against is not appealable nor would it have a reasonable prospect of success. As to the question of appealability, Mr Kutumela placed reliance on the decision of Absa Bank Limited v Mkhize and Others and Related Matters[4].

9. In this regard counsel argued that this court by upholding the *point in limine* on joinder, the decision of the court was merely preparatory or procedural in nature and even if it is of considerable practical importance to the applicant, it is not an order from which an appeal under the circumstances would lie, apart from the final decision on the merits. By permitting the applicant to appeal this court's decision on joinder, it will result in a fractional disposal and a piecemeal hearing of the appeal.

10. Furthermore, it might very well be that this courts' decision may cause inconvenience to the applicant or that it might place the applicant at a disadvantage in the litigation, which nothing but an appeal can correct, but that these considerations are not taken into account in determining the appealability of the decision of the court.

[4] [2014] 1 All SA 1 (SCA)

11. Lastly, Mr Kutumela, argued that as the appeal relates to the interpretation of the National Credit Act, the Tribunal Rules and the manner in which the Tribunal exercises its powers, the appeal cannot be heard without affording the Tribunal an opportunity to make submissions before the court of appeal if it so wishes. It is on this basis that Mr Kutumela submitted that the decision sought to be appealed does not dispose of all the issues in the case, nor would the appeal lead to a just and prompt resolution of the real issues between the parties.

NON-APPEALABILITY

12. The standard test whether a particular decision is appealable was stated in Zweni as follows:

"Generally speaking, a non-appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it), not definite of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

13. The three attributes on a non-appealable decision as set out in Zweni need not all be present at the same time. The presence of any one of these attributes may render a decision non-appealable. In the order of this court, all these attributes are to be found and I proceed to deal with same below.

Is the court's decision final?

14. In the order of this court, the matter was determined on a *point in limine* raised by the respondent. In this regard the court found that the Tribunal being a

statutory juristic body established in terms of the National Credit Act and an entity which acts separately and independently from the National Credit Regulator, is an interested party which ought to have been joined to the proceedings. The court did not determine the merits of the appeal, but merely concluded that the failure by the applicant to join the Tribunal to these proceedings, is material. However, the aforesaid court's determination is not dispositive of the appeal nor does it render the appeal defective. It is for this reason that the court deemed it fit to postpone the appeal *sine die.*

Is the decision definitive of the rights of the parties?

15. The court's decision does not affect the parties' rights at all. It does not affect the right of the applicant to prosecute its appeal. It merely directs the applicant, that in order to prosecute its appeal, it ought to join the Tribunal whose decision it is taking on appeal. The applicant remains at liberty to direct this court to evidence that it considers necessary and relevant for the adjudication of this appeal, and so too, it remains at liberty to make submissions with reference to the law and cases in support of such appeal. The decision sought to be appealed is therefore, not definitive of the rights of the parties.

Does the decision dispose of at least a substantial portion of the relief claimed?

16. The third question to be answered is whether the decision of this court disposes of a substantial portion of the relief claimed. In this regard the relief claimed by the applicant before the Tribunal was whether the investigation by the respondent was conducted without cause and not in accordance with the

National Credit Act; and whether or not there was a valid referral before the Tribunal, which answer is inextricably linked to the admissibility or otherwise of the investigation reports. Two of the members of the Tribunal concluded that the investigation of the respondent was valid and that the matter should proceed for determination of the merits, and it is this decision of the Tribunal which forms the subject-matter of the appeal.

17. This courts' order made no pronouncement regarding the success or otherwise of the merits of the appeal. In contrast the appeal was postponed *sine die*. The court is yet to decide on the merits of the appeal upon its hearing should the applicant so desire, and it therefore follows that the order of the court does not dispose of at least a substantial interest of the relief claimed.

18. For the reasons set out above, I am not persuaded that the decision of this court is indeed appealable. Therefore it must follow that the application would not have a reasonable prospect of success and stands to be refused.

ORDER

19. In the result the following order is made:

19.1. The application for leave to appeal the order dated 30 August 2019, is dismissed with costs, such costs to include the costs consequent upon the employment of counsel.

C.J. COLLIS

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA

I agree

M.SENYATSI

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

Appearances as follows:

For the First and Second Applicants	: Adv. D. M. Fine SC and Adv. A. Milovanovic-Bitter
Attorney of the First and Second Applicant	: Smit Sewgoolam Inc.
For the Respondent	: Adv L. Kutume

Attorney for the Respondent	: Geldenhuys Malatji Inc
Date of Hearing	: 02 December 2019
Date of Judgment	: 03 February 2020