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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 5870/2018

In the matter between:

**THE LAND AND AGRICULTURAL
DEVELOPMENT BANK OF SOUTH AFRICA**

Applicant

and

JACO JONKER

(ID NO: [.....])

1st Respondent

ESPERANZA JONKER

(ID NO: [....])

2nd Respondent

JUDGMENT:

MOENG, AJ

HEARD ON:

6 SEPTEMBER 2019

DELIVERED ON:

20 SEPTEMBER 2019

- [1] This is an application for leave to appeal against the whole of my judgment delivered on 20 June 2019. Nine grounds of appeal were raised. I do not deem it necessary to repeat them. The essence thereof is that I erred in the findings I made regarding the provisions of the National Credit Act and the decision to declare the properties specially executable. Issue is also taken with the purported discrepancies with regard to the arrear amounts and interests that were charged. I will refer to the parties as in the previous application in which judgment was sought.
- [2] I pause to note that the respondents only sought leave to appeal on case 5870/2018 and not case 109/2019. Mr Du Plessis indicated that this was an oversight on his part. It is common cause that the applications in both case 5870/2018 and in case 109/2019 was dealt with in the same judgment, as the issues and the defences that were raised, were the same. The ruling whether or not leave should be granted in case 5870/2018 will logically affect the judgment in case 109/2019.
- [3] On the strength of the foregoing grounds of appeal, the respondents submit that in the circumstances, there is a reasonable prospect of success and that another court may come to a different conclusion. The application is opposed. The applicant contends that none of the grounds of appeal have any substance and that another court would not reach a different finding.
- [4] Section 17(1) of the Superior Court Act provides that leave to appeal may only be granted where the judge or judges are of the opinion that

the appeal would have reasonable prospects of success. In a similar application, Daffue J, referring to **Acting National Director of Public Prosecutions and Others v Democratic Alliance** (19577/09)[2016] ZAGPPHC, held in **Land and Agricultural Development Bank of SA v Jandrea Boerdery CC and Others** case 3127/2018 that the bar for granting leave to appeal has now been raised. The test is not whether there are reasonable prospects of success, but rather whether another court would come to a different conclusion. The fact that the word “would” is used, was according to Daffue J an indication that a measure of certainty, that another court will differ from the court whose judgment is appealed against, is required.

- [5] The issues raised in this application relate to whether I erred in concluding that the loan agreement that Land Bank relied on, in obtaining judgment, amounted to a restructuring of the long term loan agreement that was previously entered into and not a novation thereof. It was also submitted that I erred in dismissing the defenses pertaining to the provisions of section 81, 90, 110, 111 and 129 of the NCA. It was lastly contended that there were various discrepancies regarding the amounts claimed and interests levied.
- [6] The issues regarding novation were fully canvassed in my judgment. The arguments advanced in this application are in essence a repeat of what was submitted during the course of the hearing wherein judgment was sought. I was satisfied that the respondents did not prove that the agreement concluded in October 2014 amounted to a novation of the agreement concluded in January 2014. All indications

were that the first respondent applied for the restructuring of the long term loan agreement as he could not fulfill his obligations. The agreement was restructured subject to the condition that no further extensions would be granted and that the arrear portion of the long term loan agreement be transferred to a medium term loan. I refer to the reasons advanced in paragraph 22 to 28 of my judgment. Another court would, in my view, not come to a different conclusion on this ground.

- [7] The respondents also took issue with the locus standi of Land Bank to have launched the application. This issue was decisively dealt with in **Land and Agricultural Development Bank of SA v Jandrea Boerdery CC and Others** case 3127/2018. The applicants' petition to the SCA was dismissed. Their resultant application for special leave to appeal was also refused by the President of the SCA.

- [8] The applicants *in casu* are represented by the same firm that represented Jandrea Boerdery. Indications from the heads of argument are that the applicants intend to approach the Constitutional Court for relief in the Jandrea Boerdery case. What however remain is that one judge from this division and three judges from the SCA decisively dealt with this issue. No court will therefore in my view come to a different conclusion.

- [9] Much was debated by Mr Du Plessis about the interpretation of section 110 and 111 of the NCA. Credit providers are obliged by the provisions of section 110 to furnish consumers with statements of account. Statements were provided upon request but these were not

to the satisfaction of the respondents. The respondents submitted that these statements did not comply with section 110.

- [10] The Act does not provide any remedy to a consumer who is dissatisfied with the form and content of statements that are provided by a credit provider. As was indicated in **De Bruin v First Rand Bank Ltd t/a Wesbank** (42493/2015) [2017] ZAGPJHC 132 (5 May 2017), this is a *lacuna* in the NCA that cannot be addressed by inventive interpretation. The respondents' intention to approach the Tribunal, in terms of section 134 to address the applicant's failure to provide them with proper statements, never came to fruition. A decision to approach the Tribunal would however not affect or suspend enforcement proceedings.
- [11] Section 111 affords a consumer the right to dispute all or part of any particular credit or debit entered under a credit agreement. Section 111(2)(b) prohibits a credit provider from beginning with enforcement proceedings on the basis of a default arising from the disputed debit or credit entry. The respondents sought to dispute all the entries that were contained in the statements that were supplied.
- [12] This dispute followed the delivery of the section 129 notice on 16 and 17 October 2018. It is common cause that the respondents issued the section 111 notice in response to the section 129 notice. The section 111 notice was admittedly only issued on 26 October 2018 after the section 129 notice was already issued. It is trite that a section 129 notice is the first step in enforcing a credit agreement. (See **Nedbank Ltd and Others v National Credit Regulator and**

Another 2011(3) SA 581(SCA) at para 14). The respondents were therefore not entitled to rely on the prohibition against enforcement proceedings as provided for in section 111(2)(b) as the proceedings had already commenced. I again refer to the reasons I advanced in paragraph 29 to 38 of my judgment.

- [13] The respondents contend that the applicant failed to convey the correct overdue amounts in the section 129 notice and failed to address such notice to the second respondent. The respondents reliance on **Amardien and Others v Registrar of Deeds and Others** 2019(3) SA 341 (CC), is without merit. The applicant in the present case provided the respondents with overdue amounts in the section 129 notice. The purpose of providing the overdue amounts is to allow the consumer to utilise the remedies afforded to him/her in terms of the NCA. The respondents, in annexure EDP1 of the answering affidavit, had no difficulty in calculating what the arrear amounts are in their view.
- [14] I refer to paragraphs 44 to 45 of my judgment with regard to the service of the section 129 notices on the second respondent. I am satisfied that another court would likewise not reach a different conclusion on this ground. Of relevance is the decision in **Motor Finance Corporation v Herbert** (case 16098/2011 an unreported judgment in the Western Cape), with regard to this ground.
- [15] I do not deem it necessary to deal with the grounds of the alleged reckless credit and the invalid clauses in the agreements. There is in my view simply no merit to conclude that another court would reach a

different finding. Similarly, no grounds were advanced why the immovable properties should not have been declared specially executable.

[16] I will in the result dismiss the application for leave to appeal with costs.

L.B.J. MOENG, AJ

On behalf of applicant: Adv. FH Terblanche SC and AJ Wessels
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