THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: YES/NO

Case No: 6576/2017

In the matter between:

PENENE JACOB STHOLE Applicant

and

FIRSTRAND BANK LIMITED t/a WESBANK Respondent

Coram: Opperman, J

Heard: 22 November 2019

Delivered: 3 December 2019

Judgment: Opperman, J

Summary: Application for leave to appeal – application for rescission of default judgment dismissed

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JUDGMENT

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[1] The matter lies before me in terms of section 17(2)(a) of the Superior Court Act 10 of 2013.[1] Morobane, acting judge at the time of the hearing of the case, is not available.

[2] I pause to note that the applicant has passed away in the meanwhile on 20 August 2019. Substitution was settled between the parties and as to the parties in terms of

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[1] "Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division."

Rule 15[2] and confirmed by the court. The executor of the applicant's estate appointed in terms of section 18(3) of the Administration of Estates Act 66 of 1965 caused the continuation of the action.

[3] The case revolves around an instalment sale agreement in terms of the National Credit Act 34 of 2005. In terms of the agreement the applicant purchased a vehicle but fell in arrears with the instalments. The total amount payable at the time of the application for default judgment was R534 980.70. Judgment was granted against the applicant, the vehicle removed and sold on auction. The applicant applied for rescission of the default judgment.

[4] On 22 February 2019 it was ruled that the application for rescission of the default judgment: "…is out-of-time and the applicant should have applied for condonation for the late filing thereof." The presiding judge ordered that the point *in limine* succeeded, the application for rescission of the default judgment was dismissed and the applicant to pay the costs.

[5] The issue *in limine* was that the application was not filed within the period as prescribed in rule 31(2)(b) of the Rules.[3] The applicant did not, for that matter, file an application for condonation. The applicant proceeded directly to the main application for rescission.

[6] The main argument on the condonation aspect is threefold; that the applicant could not provide a reasonable explanation for his default, failed to disclose a *bona fide* defence and his case lacks evidence that proposes a chance of success. The case for the applicant also folded because of the mendacious nature of his evidence. In paragraph [11] the court found that:

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[2] Rule 15(3)
"Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted."

[3] "A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit."

Therefore, I am of the view that the applicant's version is mainly disputed, unsatisfactory and falls short of the required standard.

[7] The undisputed facts are that:

1. The applicant was in arrears at the time the order in terms of Rule 31 was issued.
2. Since the applicant became in arrears in April 2017 the respondent had made numerous phone calls and send SMS text messages to the applicant to urge him to bring his arrears up to date. The applicant was visited in person to ensure that he was aware of the fact that he is in arrears.
3. Notice in terms of section 129 of the National Credit Act 34 of 2005 was served by way of registered post on 15 November 2017.
4. That respondent issued summons on 14 December 2017. Service was effected on the applicant personally by the sheriff on 9 January 2018.
5. In a letter dated 24 January 2018 the applicant's legal representative had sent an electronic mail to the legal representative of the respondent wherein he inquired about the arrears and the possibility to effect payment.
6. On 28 February 2018 the respondent replied and accepted the offer that the arrears as well as legal costs could be settled but not over the maximum term. The applicant was not able to bring the arrears up to date and said arrears only escalated to the extent that it became clear that he would not be in a position to meet his responsibility. (This fact is supported by the applicant's attorney's request to release of the vehicle against the payment by the applicant of the amount of only R50 000. The letter was dated 22 August 2018. The outstanding amount in arrears escalated to R61 447.92. The second offer came after a further notification of the respondent that the vehicle can be released upon payment of the entire outstanding balance that included legal fees, recovery charges and storage costs.)
7. Default judgment was granted on 22 June 2018. A warrant for delivery of the vehicle was also granted in due course.
8. On 19 July 2018 the vehicle in issue was removed by the sheriff. It appears from the return of service that there were various attempts made by the sheriff to obtain possession of the vehicle before the actual removal. The sheriff for instance met with the applicant's son at the taxi rank and the applicant's son indicated to the sheriff that he will ask the applicant to contact the sheriff. The

sheriff also phoned the applicant's son on three further occasions to arrange for the collection of the car.

9. On 25 July 2018 the applicant deposited R24 000 with his legal representative in order for his debt to be settled. The attorney did not comply and reimbursed the applicant. The reason therefor is not clear.
10. The vehicle was sold on auction on 25 September 2018 by the respondent.
11. Service of all material documents were proper and lawful.
12. There was not an application for condonation before the court at any stage. The hearing followed. Although the court *a quo* referred to the issue of condonation as a point *in limine,* the merits of the application was also argued and adjudicated. The court *a quo* applied his mind to the facts and legal principles in *toto*.

[8] The application for leave to appeal is based on section 129 of the Credit Act 34 of 2005 read with the matter of *Nomsa Ntaka v First Rand Bank Limited* 2016 (4) SA 257 (CC).

Section 129 of the NCA reads:

(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

[Sub-s. (3) substituted by s. 32 (*a*) of Act No. 19 of 2014.]

[9] The applicant was never; on his own version able to at any time before the credit provider has cancelled the agreement and thereafter, remedy the default in the credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied. This brings me to the adjudication of an application for leave to appeal.

[10] The right to appeal, as managed by among others, the application for leave to appeal, may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. The Superior Courts Act 10 of 2013 regulates the adjudication for leave to appeal specifically.

[11] Historically the rule was: "In that reasonable prospects exists that another Court, sitting as the Court of Appeal, would come to different findings and conclusions on the facts and the law." It is now being worded differently in The Superior Courts Act 10 of 2013 per section 17(1)(a)(i) promulgated on 22 August 2013 to read:

(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 on 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.

[12] In *Shinga v The State & Another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae)*; *S v O'Connell & Others* 2007 (2) SACR 28 (CC) at [53], it was summarised that:

Applications for leave to appeal is a judicial task of some delicacy and expertise. This task requires a careful analysis of both the facts and the law that provided the basis for the judgement. Presiding officers should approach the question whether another court may reach a different conclusion with "intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor overanxiously referring decisions that are indubitably correct to an appellate Court.

[13] In *S v Smith* 2012 (1) SACR 567 (SCA) at [7] the court laid down the approach to an application for leave as follows:

What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.

[14] There cannot be a difference in "that it must be proven that reasonable prospects exist that another Court, sitting as the Court of Appeal, would come to different

findings" and "the appeal would have a reasonable prospect of success." Both refer to "success" and a "prospect" and it is what it is. It is semantic and the weight of the onus has not been raised. It has been codified and the codification to be interpreted to mean that a sound, rational basis for a conclusion that there are prospects for success on appeal must be shown. This has always been the rule and the word "would" simply confirm that it must be proven and it remains a prospect to be evaluated on a sound basis; nothing more and nothing less.

[15] Section 17(1)(a)(i) did not push the threshold higher as was suggested after *Notshokovu v S* (157/15) [2016] ZASCA 112 (7 September 2016). It is only in regard to the context of special leave that the test is more stringent.

[16] After pondering the matter on the premise that there must be a sound, rational basis for the conclusion that there are prospects of success on appeal I am convinced that an appeal on fact and law will fail.

[17] **ORDER**

The application for leave to appeal is dismissed with costs

M OPPERMAN, J

<u>Appearances</u>

For applicant:	ADV N.D. KHOKHO Chambers Bloemfontein
Instructed by:	MELATO ATTORNEYS Sasolburg c/o Maree & Partners Bloemfontein Ref: JJMAREE/rk/JS1112
For respondents:	ADV W.J. GROENEWALD Chambers Bloemfontein

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