



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 1294/2016

In the matter between:

SEAN MORNÉ BROWN

First applicant

ZANDRA SURETA BROWN

Second applicant

and

NEDBANK LTD

Respondent

JUDGMENT DELIVERED ON 24 MARCH 2025

VAN ZYL AJ:

Introduction

1. These proceedings were born out of frustration because the applicants felt that they were not getting through to the respondent.
2. Unfortunately, the pursuit of this litigation has not served the applicants well, however much sympathy one may have for their position. Much of the relief originally sought and addressed in the papers was abandoned when the replying affidavit was delivered. The relief that was persisted with cannot be

granted. I discuss this below.

The previous litigation between the parties

3. Over the period 2005 to 2013 the respondent concluded various credit agreements with the applicants. The applicants' liability under the credit agreements were secured by covering mortgage bonds registered over their immovable property. The provisions of the National Credit Act 34 of 2005 ("the NCA") applied to these agreements.

4. It is common cause that, for the reasons set out in the founding papers, the applicants could not comply with their bond obligations, and fell in arrears. The situation is summarized in the applicants' heads of argument as follows:

"The Respondent extended credit to the Applicants to finance the construction of their home on a stand in the prestigious Pearl Valley Estate that the Applicants had purchased with their own funds. As security for this indebtedness, mortgage bonds were secured over the property. During the final stages of construction, the builder absconded with the last progress payment, leaving only the installation of finishes, plumbing, electrical work, fencing, and the issuance of a waterproofing certificate to be completed. Despite the Applicants' good payment history, the Respondent refused to release the remaining R1.2 million in available funds necessary to complete the construction. Furthermore, the Respondent ignored the Applicants' repeated requests for credit and failed to engage with them on the matter. As a result of the financial strain caused by the incomplete project, ongoing bond repayments, and the need to pay rental, the Applicants fell into arrears."

5. It is clear from the history detailed by the applicants in the founding affidavit that they experienced a very unfortunate series of events, resulting in financial dire straits at the time.
6. On 1 February 2016 the respondent issued summons against the applicants.

The arrears at the time were about R67 000,00. Instead of defending the claim, the applicants concluded a settlement agreement with the respondent on 22 April 2016. In terms of the settlement agreement, the applicants admitted liability for payment of the capital amount of R6 803 217,06 to the respondent, together with interest, as well as costs on an attorney and client scale.¹ The applicants' immovable property was declared specially executable, but the sale in execution was stayed for a period of 60 days, commencing 1 March 2016, to allow the applicants to sell the property themselves. If the applicants were unable to sell the property themselves, the respondent was entitled to proceed with a sale in execution.

7. Notably, the terms and conditions of the relevant loan and bond agreements would continue to apply:²

“The terms and conditions of the Loan Agreement and Mortgage Bonds [numbers] remain unaffected and will continue to be of full force and effect and the Applicant / Plaintiff will be entitled to rely on the aforementioned documents for any purposes. It is specifically recorded that the Applicant / Plaintiff does not waive or abandon any of its rights contained in the Loan Agreements and Mortgage Bonds [numbers].”

8. The settlement agreement provided that the applicants would make payment of R5 000,00 per month until all the amounts contemplated by the settlement agreement have been settled in full.

“The Defendant will continue to make payment towards the arrears with reference to the amount claimed under the above case number in the amount of R5 000,00 per month from the 1st of April 2016 and monthly thereafter until the full amount detailed above has been settled”.

9. The settlement agreement was made an order of court on 6 May 2016.

¹ The scale of costs was provided for in the relevant credit agreements.
² Under clause 8 of the settlement agreement.

10. The applicants were unable timeously to find a purchaser for the property through private treaty. There is some wrangling on the papers as to what communications had passed between the parties at the time, and whether the respondent should have accommodated the applicants by postponing the sale in execution. While there was an unformalized offer to purchase the property on the cards, the property was sold by way of a sale in execution on 11 August 2016. The applicants were clearly dissatisfied with the situation but they took no formal action have the sale in execution set aside. It is common cause that the property was sold for R3 855 000.00, which was insufficient to settle the capital of the judgment amount, let alone the interest that had accrued. As at the date of the sale in execution, the applicants' arrears had increased to R437 454,99.
11. As at 31 July 2024, after the current application was launched, the applicants were still indebted to the respondent in the amount of R2 977 921,79.
12. Whilst the applicants made some payments towards payment of the balance outstanding over time, it is common cause that they missed several payments. During 2020, they increased the payments to R5 200,00 per month. The applicants concede, however, that they unilaterally decided to suspend these payments when they embarked on this litigation. At the hearing of these proceedings, counsel for the applicants acknowledged that they were in contempt of the court order embodying the settlement agreement.

The main application, and the application for an amendment of the notice of motion

13. The applicants instituted the current application in July 2024, some eight years after the settlement agreement had been made an order of court. It is necessary to refer to the nature of the relief sought.

14. The main focus of the application was an order seeking the reinstatement of the credit agreements that were the subject of the settlement agreement. Aside from prayer 1, which deals with condonation,³ the notice of motion seeks the following relief:

"2. *Declaring that:*

- 2.1 *The applicants had remedied their default by operation of law on the basis that the applicants paid all the arrears on the loan agreement at a time that the loan agreements were in full force and effect prior to the sale in execution;*
 - 2.2 *The loan agreements dated 11 March 2005, 4 July 2007, and 15 October 2013 ("the loan or credit agreements") which the respondent sought to enforce in Western Cape Division case 14272/10 has become revived and reinstated in terms of section 129(3) of the National Credit Act.*
3. *Pursuant to such reinstatement the respondent be directed to make the remainder of the credit in terms of the reinstatement credit agreements available to the applicants by such further term as agreed to by the respondent.*
4. *In addition to the relief formulated above, and in the alternative in the event of an inability to make such orders, the applicants ask the following relief:*
- 4.1 *Directing the respondent to, subject to its standard terms and conditions grant the applicants access to further credit, the proceeds of which shall be used for the purchasing of immovable property in their name;*
 - 4.2 *Declaring that the monthly payment to the respondent in the amount of R5 200 currently in effect, be applied towards the reduction of the shortfall remaining owing by the applicants, until such time that the parties reach agreement on an*

³ Condonation was sought in respect of the "late service and filing" of the main application, but it was accepted that no such condonation was in fact required, given the nature of the application.

increased payment.

5. *That all fresh processes contemplated by the respondent and emanating from the judgment of 9 May 2016 under case number 1294/2016 be stayed, pending the outcome of this application.*
 6. *That the respondent be directed to immediately cause to be expunged from the records retained by the credit bureaus, any adverse information concerning the applicants, thereby restoring their good standing.*
 7. *That each party pay their own costs in this application."*
15. In its answering affidavit, delivered on 28 August 2024, the respondent raised various points *in limine*, submitting that the relief sought is either bad in law, or that no case for it has been made out. These points will be discussed in due course below.
 16. The applicants delivered their replying affidavit on 16 September 2024. In it, they changed tack by indicating that they were abandoning prayers 2, 3 and 6 of the notice of motion. This was because the respondent had pointed out, in its answering affidavit (as well as in correspondence preceding the delivery of the answering affidavit), that a reinstatement of the relevant credit agreement would not be permissible in the circumstances.
 17. The applicants persisted in seeking the relief set out in prayers 4, 5 and 7 of the notice of motion.⁴ The replying affidavit further conceded that the wording of prayer 5 "*does not make sense*", and indicated that this would be changed by a subsequent notice of intention to amend. The replying affidavit did not indicate how, exactly, the wording of prayer 5 was to be amended.
 18. On 20 September 2024 the applicants delivered their notice of intention to amend. The notice confirmed the abandonment of prayers 2, 3 and 6. It further

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It is unclear from the replying affidavit whether both paragraphs 4.1 and 4.2 would be relied upon, but counsel confirmed at the hearing that the applicants sought the relief set out in both.

sought the reformulation of the existing prayer 4, and the reformulation of prayer 5.

19. On 27 September 2024 the respondent delivered a notice of objection to the proposed amendments.⁵ Despite this, no formal application for amendment was launched.⁶ With the knowledge that the time period for the launching of the application to amend was overdue, the applicants consented to a court order postponing the main application for hearing on 5 March 2025. The court order (dated 18 October 2024) provided a timetable for the delivery of heads of argument, but not for the delivery of an application for amendment.
20. On 6 February 2025, the applicants delivered a formal application to amend their notice of motion in the terms indicated in their notice delivered some four and a half months earlier.
21. On the morning of the hearing, when the matter was called, counsel informed the Court that the application for amendment had been withdrawn. It transpired that counsel for the respondent only learned of the withdrawal moments before the commencement of the hearing. Counsel for the applicants indicated that they did not wish to have the main application postponed for the delivery of further answering affidavits should the proposed amendments be granted. This was in reaction to the respondent's indication in its heads of argument that it would (in the event of a successful amendment application) need to deal with the amended relief sought in fresh affidavits – a not unreasonable stance on the respondent's part.
22. In any event, the parties were agreed⁷ that the amendment application could

⁵ This was done within the 10-day period prescribed by Uniform Rule 28(2).

⁶ In terms of Uniform Rule 28(4), the formal application for amendment had to be delivered 10 days after delivery of the notice of objection, that is, by no later than 11 October 2024.

⁷ In terms of Rule 41(1)(a): "*A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, ...*" (emphasis added).

be withdrawn, but the costs thereof remained in dispute. The applicants did not wish to make any tender in that respect, despite the merits of the amendment application having taken up a considerable portion of both parties' heads of argument. When counsel for the applicants was asked where the costs burden should lie if a party launched an application but abandoned it on the morning of the hearing in the face of much time and effort having been expended on it, she conceded that such party ought to bear the costs of the application:⁸

"Where a party withdraws a claim the other is entitled to costs unless there are good grounds for depriving him: Germishuys v Douglas Besproeiingsraad 1973 (3) SA 299 (NC) and SentraBoer Kooperatief Bpk v Mphaka 1981 (2) SA 814 (O)."

23. In the present case, no sound reasons were furnished as to why the respondent should not be entitled to costs. That was the end of that matter.
24. The main application is thus the only application that needs to be considered. Of the original notice of motion, only prayers 4 and 5, as well as 7 (in relation to costs), remain for determination.

The relief sought in prayer 4.1

25. Prayer 4.1, in its unamended form, is couched in peremptory terms: *"Directing that the respondent ... grant the applicants access to further credit ... "*.
26. The fundamental difficulty with this prayer is that it seeks to compel the respondent to enter into a credit agreement with the applicants. While section 60(1) of the NCA does afford a person the right to apply for credit, this right is qualified by sections 60(2) and 60(3) which state, *inter alia*, that a credit provider cannot be compelled to enter into a credit agreement, at least not without it

⁸ *Waste Products Utilisation (Pty) Ltd v Wilkes and another (Biccari Interested Party)* 2003 (2) SA 590 (W) at 597A-B.

having done an affordability analysis and a risk assessment. Section 60 reads as follows:

“60 Right to apply for credit

- (1) *Every adult natural person, and every juristic person or association of persons, has a right to apply to a credit provider for credit.*
- (2) *Subject to sections 61 and 66, a credit provider has a right to refuse to enter into a credit agreement with any prospective consumer on reasonable commercial grounds that are consistent with its customary risk management and underwriting practices.*
- (3) *Subject to sections 61 and 92(3), nothing in this Act establishes a right of any person to require a credit provider to enter into a credit agreement with that person.*⁹

27. An order as formulated in prayer 4.1 will therefore amount to a contravention of the NCA and the provisions relating to risk assessment and providing reckless credit.¹⁰ It is not only bad in law given the provisions of the NCA, but also under the common law: it is trite that a court cannot compel parties to conclude a contract.
28. Counsel for the applicants sought to argue that what the relief sought in prayer 4.1 amounts to is merely an order compelling the respondent to consider the applicants' application for credit. The argument amounts to a reintroduction of the abandoned application for amendment, with its proposed reformulation of prayer 4.1.¹¹ Be that as it may, the respondent has in its answering affidavit invited the applicants to submit a credit application, and has undertaken to consider it. There is no need for an order under the “reformulated” prayer 4.1.

⁹ Emphasis added. Neither section 61 nor section 92(3) is relevant for present purposes.

¹⁰ See, for example, sections 61(5) and 78 to 88 of the NCA.

¹¹ The proposed (but abandoned) amended prayer 4.1 reads: “*Directing the respondent to examine the applicants' financial situation thoroughly as part of an affordability analysis and if determined to be eligible for credit to purchase immovable property in their name, grant the (sic) same to them, under such terms and conditions imposed by the respondent.*”

The relief sought in prayer 4.2

29. Prayer 4.2 in its original form is vague,¹² and the respondent initially interpreted it to mean that the applicants were seeking to reformulate the payment arrangement in the existing settlement agreement. In the replying affidavit, however, the applicants clarified that what was meant by the prayer "*is simply my request that they [the respondent] adhere to the terms of the settlement and reduce the shortfall with the monthly payments*".¹³
30. If this is the proper interpretation of prayer 4.2, then it is a *brutum fulmen*. It makes little sense for a court to make a declaratory order which amounts to duplicating an existing order.
31. In argument, counsel for the applicants indicated that it was the applicants' case, to be confirmed by the relief sought in prayer 4.2, that the respondent was never entitled to claim anything more than R5 000,00 per month on the outstanding balance under the mortgage bonds. Given the current formulation of prayer 4.2 I do not have to decide this question. I point out however that, on the applicants' argument, it will take them about 49 years to repay the capital currently outstanding (leaving aside interest).¹⁴ The argument also ignores paragraph 8 of the settlement agreement which, as indicated earlier, retains the respondent's rights under the relevant loan agreements and the mortgage bonds.
32. Another consideration arises in relation to this prayer. I have mentioned the

¹² *Eke v Parsons* 2016 (2) SA 37 (CC) at para [64]: "The rule of law requires not only that a court order be couched in clear terms but also that its purpose be readily ascertainable from the language of the order. This is because disobedience of a court order constitutes a violation of the Constitution".

¹³ The proposed (but abandoned) amended prayer 4.2 reads: "*Directing that the monthly payment made by the respondent as stipulated in clause 9 of the settlement agreement, or such increased payment agreed between the parties, be applied to the reduction of all amounts remaining due as contemplated by the settlement agreement, including the shortfall.*"

¹⁴ The outstanding capital, as at 31 July 2024, was R2 977 921,79. This amount divided by R5 000.00 results in a repayment period of about 595 months (49,63 years).

fact that, on the applicants' own version, they have unilaterally suspended payment of the monthly amount of R5 000,00 required by the settlement agreement. The applicants are therefore seeking protection from the court in circumstances where they are in contempt of the very court order (that is, the settlement agreement) which is the subject of their relief. As a matter of principle, the court should not come to the assistance of a litigant who is in contempt, and who has not purged his or her contempt:¹⁵ “...*no application to the Court by a person in contempt will be entertained until he or she has purged the contempt.*”

33. In these circumstances, there is no basis for the grant of the relief sought in prayer 4.2 of the notice of motion.

The relief sought in prayer 5

34. This prayer, in its current form, effectively seeks an interim interdict prohibiting the respondent from instituting any proceedings under or pursuant to the settlement agreement and the action that gave rise to it. The applicants do not, however, make out any case for the grant of such an interdict.
35. There is no indication as to what the *prima facie* right is that is relied upon for the grant of interim interdictory relief. The applicants' heads or argument merely state that the court has a “*discretion*” to stay “*any fresh legal proceedings*”. This is not an accurate submission. While the court has a limited discretion to refuse the grant of an interdict, even when its requirements were met, the discretion does not operate in reverse, that is, there is no discretion to grant an interdict where none of the requirements for an interdict have been met.
36. There is no indication as to what irreparable harm the applicants would suffer if

¹⁵ *Di Bona v Di Bona* 1993 (2) SA 682 (C) at 688G. There are exceptions to this rule, but no argument was addressed to me in support of the proposition that the applicants fell within an excepted category of litigants.

this relief were not granted, where the balance of convenience lies, or why they do not have a satisfactory alternative remedy. If, for the sake argument, the respondent were to institute meritless legal proceedings against the applicants in future, the obvious remedy would be to put up a defence, and to illustrate why the respondent's case has no merit. Any notional "harm" can be cured by a costs order against the respondent. It is not for this court to pre-empt what proceedings the respondent may or may not institute in future, and it is not this court's function to pre-judge those future proceedings before it has materialised.

37. During argument counsel for the applicants contended that prayer 5 was "incorrectly worded", and that the applicants merely wanted to prevent the respondent from instituting any proceedings in the relation to the settlement agreement. This submission does not address the difficulties set out above in relation to this prayer. It ignores, yet again, paragraph 8 of the settlement agreement, which retains the respondent's rights under the relevant loan agreements and the mortgage bonds.
38. An order in terms of prayer 5 would in any event be meaningless at a basic level, because it seeks that the interdict be operative *"pending the outcome of this application"*. The notional interdict will therefore commence and lapse at the same time. There is simply no sense in granting this relief.

Costs

39. The general rule is that costs should follow the event. The applicants insist that each party should pay their own costs, as sought in prayer 7 of the notice of motion. Counsel submitted that the applicants were compelled to institute these proceedings, given the history to the matter. The essence of the argument is captured in the following submission from the heads of argument:

“The Applicants have been placed in a challenging financial position due to circumstances largely beyond their control. However, with fair treatment and a reasonable opportunity to restructure their obligations, they are fully capable of restoring financial stability and achieving long-term economic growth. In the interests of justice and equity, the Applicants respectfully request that this Honourable Court grant the relief sought.”

40. The reasons why the relief sought by the applicants cannot be granted have been dealt with above. I do not agree that the circumstances in which the application was brought justifies an order that each party pay their own costs. The application was brought with much emotional gusto but little merit. The applicants abandoned most of the relief originally sought when the respondent, in the answering affidavit, pointed the correct legal position out to them. Yet, they persisted in seeking relief that was patently without merit. The amendment application was abandoned at the last moment. The respondent had no choice but to continue its opposition to both the main and the amendment applications, and prepare argument for all the contingencies right up to the hearing of these proceedings.
41. Rule 67A(3)(b), in relation to the scale of counsel’s fees, refers to considerations which may include the complexity of the matter, the value of the claim, and the importance of the relief claimed. This is clearly not a closed list of considerations. In the exercise of my discretion on the available facts as a whole, I am of the view that an award of counsel’s fees on Scale B is warranted.

Order

42. In the circumstances, it is ordered as follows:

- 42.1. The main application is dismissed, with costs, including counsel’s fees on Scale B.

42.2. The costs of the application for amendment instituted on 6 February 2025 shall be borne by the applicants, including counsel's fees on Scale B.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicants:

Ms R. Caprari, instructed by Francois
Pienaar Attorneys Inc. t/a FDP Law

For the respondent:

Mr J. P. Steenkamp, instructed by Kemp &
Associates