CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 52/13
[2013] ZACC 46

In the matter between:

DESTRI JOSEPH MALCOLM FERRIS	First Applicant
SORAYA LACHPORIA FERRIS	Second Applicant
and	
FIRSTRAND BANK LIMITED	First Respondent
D LEE	Second Respondent

Heard on : 5 November 2013

Decided on : 12 December 2013

JUDGMENT

MOSENEKE ACJ (Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This is an application to overturn a High Court's refusal to rescind a default judgment granted in the context of the National Credit Act[1] (Act).

Background

[2] In October 2007 Mr and Mrs Ferris, the applicants, borrowed money from FirstRand, the first respondent, to buy their home. This loan was secured by a mortgage bond over the property. Thereafter, Mr and Mrs Ferris fell into arrears with their loan repayments. In February 2009 they applied to a debt counsellor for debt review in terms of section 86(1) of the Act.[2] In March 2009 the debt counsellor made an offer to FirstRand for repayment of the loan on terms more favourable to Mr and Mrs Ferris than initially agreed. Mr and Mrs Ferris claim that this offer was ignored while FirstRand claims that this offer was refused because it was not permissible under the Act. It does not appear that FirstRand made a counter-offer.

Litigation history

[3] In September 2009 and in terms of section 86(7)[3] the debt counsellor brought an application in the Randburg Magistrate's Court to have Mr and Mrs Ferris declared

[1] 34 of 2005.

[2] Section 86(1), in a section headed "Application for debt review", provides:

> "A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted."

[3] Section 86(7) provides, in relevant part:

> "If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that—
>
> . . .

over-indebted and to rearrange their debt obligations. On 20 April 2010, and while this application was pending, FirstRand sent a notice under section 86(10) to Mr and Mrs Ferris and the debt counsellor purporting to terminate the debt review.[4] Mr and Mrs Ferris argued throughout that this notice was not properly delivered. After initially contesting this, FirstRand conceded before this Court that the section-86(10) notice had not been properly delivered. Soon after dispatch of the notice, on 30 April 2010, the Magistrate's Court granted a debt-restructuring order, based on terms requested by Mr and Mrs Ferris. It (a) declared Mr and Mrs Ferris over-indebted,[5] (b) rearranged their debt obligations, and (c) specified that the original credit agreement would "be revived and be fully enforceable" if the restructuring order were breached.

> (c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders—
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> . . .
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> (ii) that one or more of the consumer's obligations be re-arranged by—
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> (aa) extending the period of the agreement and reducing the amount of each payment due accordingly;
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> (bb) postponing during a specified period the dates on which payments are due under the agreement;
>
> (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement".

[4] Section 86(10) of the Act entitles a credit provider to terminate a debt review. It provides:

> "If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner . . . at any time at least 60 business days after the date on which the consumer applied for the debt review."

[5] Section 79(1) of the Act states that a consumer is over-indebted "if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party".

[4] On 7 May 2010, a week later, Mr and Mrs Ferris fell behind on their payments under the debt-restructuring order. On 14 June 2010, after they had fallen even further behind on their payments, having paid only R1 000 out of almost R9 000 owed, FirstRand issued summons for payment of the full balance of the loan plus interest and for an order declaring their home specially executable (enforcement action). Mr and Mrs Ferris then filed a notice of intention to defend and a plea in which they contended that the debt review had not been terminated by virtue of the section-86(10) notice. FirstRand filed a replication. It argued that it was entitled to enforce the loan because Mr and Mrs Ferris had breached the debt-restructuring order. On 20 August 2010 FirstRand applied for summary judgment. This was successfully resisted. Mr and Mrs Ferris then failed to make discovery on time. On 8 November 2011 FirstRand applied to strike out their defence and for default judgment. An order in its favour was granted the following day.

[5] On 23 May 2012, more than six months after default judgment was entered, Mr and Mrs Ferris applied for its rescission under Rule 42(1)(a) of the Uniform Rules of Court[6] or the common law or the provisions of Rule 31. In the application, they blamed the negligence of their attorneys for their failure to defend the summary judgment application. They also argued that the default judgment was wrongly granted because FirstRand's section-86(10) notice was not properly delivered and the

[6] The Uniform Rules of Court regulate proceedings in the High Court and the Supreme Court of Appeal. They were enacted under the Supreme Court Act 59 of 1959 and now derive their force from section 51 of the Superior Courts Act 10 of 2013.

sale in execution would unjustifiably infringe their right of access to adequate housing.

[6] On 5 October 2012 the High Court (Kgomo J) dismissed the rescission application on the grounds that (a) there was no basis for rescission under Rule 42(1)(a) because FirstRand's section-86(10) notice had validly terminated the debt review, and (b) even if the debt review were still in place, this would not be a complete defence on the merits. The Court concluded that there was no bona fide defence to the enforcement action, precluding rescission. Mr and Mrs Ferris applied for leave to appeal in the High Court. It was refused. They then petitioned the Supreme Court of Appeal for leave to appeal, which was refused on 22 February 2013. Two months later, on 23 April 2013, they applied to this Court for leave to appeal, well outside the time afforded under our Rules.

Jurisdiction

[7] The parties agree that this matter raises constitutional issues and thus falls within the jurisdiction of this Court. In *Sebola*[7] this Court stated:

> "The means by which the [Act's] purposes are to be achieved include 'promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit' and 'promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers'. These goals, and the means by which they are to be

[7] *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (*Sebola*).

> pursued, are intimately connected to the Constitution's commitment to achieving equality. Our jurisdiction is thus plain."[8] (Footnotes omitted.)

[8] We are seized with the task of interpreting the Act, as this Court was in *Sebola.* So, as in *Sebola*, this matter raises a constitutional issue. It is therefore unnecessary to decide whether we have jurisdiction under section 167(3)(b)(ii) of the Constitution, which came into effect as part of the Constitution Seventeenth Amendment Act.[9]

[9] The following issues remain:

(a) Should we condone the late filing of the application for leave to appeal?

(b) Does the application have reasonable prospects of success?

(c) Given the answer to (b) and other considerations, is it in the interests of justice for us to grant leave to appeal?

Condonation

[10] In *Bertie Van Zyl*[10] this Court held that lateness is not the only consideration in determining whether condonation may be granted. It held further that the test for condonation is whether it is in the interests of justice to grant it.[11] As the interests-of-justice test is a requirement for condonation and granting leave to appeal,

[8] Id at para 36.

[9] Of 2012.

[10] *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (*Bertie Van Zyl*) at para 14. See also *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37 at para 22; *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as* Amicus Curiae*)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20; and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[11] *Bertie Van Zyl* above n 10 at para 14.

there is an overlap between these enquiries.[12] For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors.

[11] Mr and Mrs Ferris blame their late filing of the application on their correspondent attorney. In my view this explanation is less than satisfactory. Further, Mr and Mrs Ferris do not have prospects of success, as will appear below. I note that FirstRand does not oppose the application for condonation, nor is there an indication that the late filing has caused any prejudice. However, the mere fact that there is no opposition and no apparent prejudice does not necessarily warrant granting condonation. Condonation cannot be had for the mere asking.

[12] Nonetheless, FirstRand stated that the issues raised are important to the banking sector and its customers because a pronouncement by this Court will bring certainty on when a credit provider may enforce a loan that is subject to a debt-restructuring order that has been breached. On balance, I am of the view that it is in the interests of justice to grant condonation.

Does the application have reasonable prospects of success?

Were the requirements for rescission met?

[13] Mr and Mrs Ferris brought their rescission application in terms of Rule 42(1)(a) or the common law or Rule 31. I deal first with the requirements under Rule 42(1)(a).

[12] *eThekwini Municipality v Ingonyama Trust* [2013] ZACC 7; 2013 (5) BCLR 497 (CC) at para 23.

Unlike under the common law or Rule 31, an applicant is not required to show good cause (including a bona fide defence) in order to succeed under Rule 42(1)(a).[13] Instead, under this Rule, a court may rescind a default judgment if it is "erroneously sought or erroneously granted".

[14] But there is no error in the default judgment. Mr and Mrs Ferris breached the debt-restructuring order. Once the restructuring order had been breached, FirstRand was entitled to enforce the loan without further notice. This is clear from the wording of the relevant sections of the Act. Section 88(3)(b)(ii) does not require further notice – it merely precludes a credit provider from enforcing a debt under debt review unless, amongst others, the debtor defaults on a debt-restructuring order.[14] Moreover, section 129(2) expressly stipulates that the requirement to send a notice under section 129(1) is not applicable to debts subject to debt-restructuring orders.[15]

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[13] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [2003] ZASCA 36; 2003 (6) SA 1 (SCA) at paras 8-9; *Mutebwa v Mutebwa and Another* 2001 (2) SA 193 (Tk) at para 16; and *Topol and Others v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650I-J.

[14] Section 88(3) provides, in relevant part:

> "Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until—
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> (a) the consumer is in default under the credit agreement; and
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> (b) one of the following has occurred:
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> . . .
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> (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal."

[15] Section 129(2) provides that the requirement to send a section-129(1) notice "does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order."

[15] The wording of the debt-restructuring order itself indicates that the original loan will be enforceable without more if the debt-restructuring order is breached. The relevant paragraph stipulates that—

> "the rights and obligations as amended by the [debt-restructuring order] will be revived and be fully enforceable should the applicant default in terms of this Court Order."

[16] It seems to me that an original credit agreement is enforceable without further notice if the relevant debt-restructuring order is breached. In *Fillis*,[16] the Eastern Cape Division of the High Court correctly stated:

> "It follows, in my view, as a matter of interpretation, that once [the debtor is in default of the relevant credit agreement and is in default of the relevant debt-restructuring order], the credit provider is at liberty to proceed and to exercise and enforce, by litigation or other judicial process, any right or security under his credit agreement without further notice."[17]

[17] It follows that Mr and Mrs Ferris's breach of the debt-restructuring order entitled FirstRand to enforce the loan without further notice. However, even if further notice were required, its absence is a purely dilatory defence[18] – a defence that suspends proceedings rather than precludes a cause of action – and is not an

[16] *FirstRand Bank Ltd v Fillis and Another* [2010] ZAECPEHC 50; 2010 (6) SA 565 (ECP) (*Fillis*).

[17] Id at para 16.

[18] *Sebola* above n 7 at para 53.

irregularity that establishes that a judgment has been "erroneously granted", justifying rescission under Rule 42(1)(a).[19]

[18] Mr and Mrs Ferris raise a number of arguments on why FirstRand was not entitled to enforce the loan even if they had breached the debt-restructuring order. None of these contentions is convincing. First, they argue that the defective delivery of the section-86(10) notice precluded enforcement of the loan, as the debt review was not terminated. This misses the point. Section 86(10) permits a credit provider to terminate a debt review by giving notice at least 60 business days after the debtor applied for debt review.[20] While FirstRand is not entitled to rely on this section for enforcement of the loan because notice was not properly given, it was independently entitled to enforce the loan on the basis of the breach of the debt-restructuring order[21] and the provisions of the debt-restructuring order itself.[22]

[19] Second, Mr and Mrs Ferris contend that because FirstRand refused the debt counsellor's initial instalment offer without making a counter-offer, it did not participate in the debt-review process in good faith.[23] Whether or not this is the case again misses the point. The good-faith requirement is aimed at the parties reaching agreement on debt restructuring before a debt-restructuring order is needed. Once a

[19] In a different context, *Mthanthi v Pepler* 1993 (4) SA 368 (D) at 376I-J held that a merely dilatory defence is not bona fide. I emphasise, however, that good cause (including a bona fide defence) is not required for rescission under Rule 42(1)(a) as stated in [13] above. To the extent that the High Court in this matter held otherwise, it erred.

[20] Section 86(10) is quoted in n 4 above.

[21] In terms of section 88(3)(b)(ii).

[22] The relevant paragraph is quoted in [15] above.

[23] As required by section 86(5)(b) of the Act.

debt-restructuring order is granted, reaching agreement is no longer necessary and the good-faith requirement for participating in the debt-review proceedings becomes irrelevant. I would also note that in this case the debt-restructuring order was granted on the very terms sought by Mr and Mrs Ferris. So, it is difficult to see how they were adversely affected by any lack of good faith.

[20] Third, Mr and Mrs Ferris submit that they "substantially" complied with the debt-restructuring order. They urge us to hold that because they substantially complied they cannot be said to have breached the order, and so FirstRand may not enforce the loan. This contention is not convincing.

[21] While our law recognises that substantial compliance with statutory requirements may be sufficient in certain circumstances,[24] Mr and Mrs Ferris have not given compelling reasons why a substantial-compliance standard would be useful or appropriate in determining compliance with a debt-restructuring order. On the contrary, there is no indication in the wording of the Act or the debt-restructuring order that anything less than actual compliance is required. Further, it was raised for the first time at the hearing before this Court, and this Court has held that it should be wary of deciding issues raised for the first time on appeal.[25] Finally, even if substantial compliance were appropriate in this case, I am not convinced that Mr and

[24] See, for example, *Liebenberg NO and Others v Bergrivier Municipality* [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) at paras 22-6 and the cases cited therein.

[25] See, for example, *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 44.

Mrs Ferris had substantially complied by the time summons was issued – at that stage, they had only paid R1 000 of the almost R9 000 owing under the order.

[22] Fourth, Mr and Mrs Ferris contend that FirstRand was not entitled to raise non-compliance with the debt-restructuring order in replication. This is not a good argument. As emphasised by Mr and Mrs Ferris, in the summons in the original enforcement action, FirstRand based its case on the debt review having been terminated as a consequence of the proper delivery of the section-86(10) notice. Mr and Mrs Ferris responded by arguing that the debt review had not been terminated. It was therefore open to FirstRand in their replication to raise the argument that even if the debt review had not been terminated it was entitled to enforce the loan because of Mr and Mrs Ferris's breach of the debt-restructuring order.

[23] The requirements for rescission under Rule 42(1)(a) have not been met as the default judgment was not erroneously granted.

[24] Similarly, the requirements under Rule 31 and the common law have not been met. Under both grounds, Mr and Mrs Ferris must show good cause for rescission, which means that they must (a) give a reasonable explanation for their default; (b) show that the rescission application is brought bona fide; and (c) show that they have a bona fide defence, including a prima facie case on the merits.[26] Mr and Mrs Ferris have not satisfied (a) or (c).

[26] *Colyn* above n 13 at para 11.

[25] Mr and Mrs Ferris have not given a reasonable explanation for their default. In attempting to explain their default, they blame the negligence of their erstwhile attorneys. An attorney's negligence does not always constitute a "reasonable explanation".[27] Further, it is not seriously disputed that Mrs Ferris knew about the default judgment about 20 days after it was granted, when FirstRand's attorney emailed her a copy of the default judgment, to which she replied. This was long before the application for rescission was made.

[26] Mr and Mrs Ferris also do not have a bona fide defence. They breached the debt-restructuring order, which empowered FirstRand to enforce the loan. They raise no other defence getting to the merits of the default action against them.

[27] I conclude that the requirements for rescission have not been met, whether under Rule 42(1)(a), Rule 31 or the common law.

Should we interfere with the exercise of the High Court's discretion?

[28] An appeal court may interfere with the exercise of a discretionary power by a lower court only if that power had not been properly exercised. This would be so if the court has exercised the discretionary power capriciously, was moved by a wrong

[27] *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141B-E. See also *ABSA v Dircon Industrial Properties (Pty) Ltd and Others* [2011] ZAGPPHC 2 at para 14.

principle of law or an incorrect appreciation of the facts, had not brought its unbiased judgment to bear on the issue, or had not acted for substantial reasons.[28]

[29] The three grounds which Mr and Mrs Ferris advance in seeking rescission – Rule 42, Rule 31 and the common law – are all based on discretionary powers exercised by the High Court. In my view, Mr and Mrs Ferris have failed to show that the High Court acted in a way that would justify our interference with its judgment.

[30] Mr and Mrs Ferris do not have reasonable prospects of success.

Interests of justice

[31] Given that Mr and Mrs Ferris do not have reasonable prospects of success, is it nevertheless in the interests of justice for us to grant leave to appeal? I do not think so. First, were we to grant the relief sought, it would merely delay the inevitable. They might get their house back for a time, but FirstRand would be entitled to enforce the loan again. We also do not know if they are able to comply with the debt-restructuring order or the terms of the revived loan. Second, Mr and Mrs Ferris did not take the Court into their confidence in this litigation. They claimed that they did not know about the default judgment in the face of compelling evidence to the contrary.[29] They also vacillated on whether they had breached the debt-restructuring

[28] *Giddey NO v J C Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at para 19; *General Council of the Bar of South Africa v Geach and Others* [2012] ZASCA 175; 2013 (2) SA 52 (SCA) at paras 58-61; *Kekana v Society of Advocates of South Africa* [1998] ZASCA 54; 1998 (4) SA 649 (SCA) at 654E-G; and *Ex Parte Neethling and Others* 1951 (4) SA 331 (A) at 335D-E.

[29] See [25] above.

order only to admit, in the hearing, that they had. Third, they have another remedy – they are entitled to sue their attorneys.

[32] I deny leave to appeal on the basis that it is not in the interests of justice for us to hear the matter, primarily because it lacks prospects of success.

Costs

[33] Given that FirstRand conceded in hearing that it does not seek costs, it is fair to make no order as to costs.

Order

[34] The following order is made:

1. Condonation is granted.
2. Leave to appeal is refused.
3. There is no order as to costs.

For the Applicants:	Advocate P Pauw SC and Advocate S Cohen instructed by Larry Marks Attorneys.
For the First Respondent:	Advocate A Gautschi SC, Advocate M Reineke and Advocate K Serafino-Dooley instructed by Bezuidenhout Van Zyl Inc.