

SOUTH AFRICA / JUDGMENT

## Barclay and Another v Standard Bank of South Africa Limited (Leave to Appeal) (65703/2020) [2023] ZAGPPHC 1918 (13 November 2023)

[2023] ZAGPPHC 1918

COURT

North Gauteng High Court, Pretoria

BEFORE

Bam NN

CASE / FILE NUMBER

65703/2020

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

CASE NO: 65703/2020

DOH: 01 November 2023

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

DATE: 13 November 2023

SIGNATURE

In the matter of:

ANDREW DAVID BARCLAY

First APPLICANT

BEVERLEY JANE BARCLAY

Second APPLICANT

And

THE STANDARD BANK OF SOUTH AFRICA LIMITED

RESPONDENT

JUDGEMENT- APPLICATION FOR LEAVE TO APPEAL

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL/ UPLOADED ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 13 NOVEMBER 2023

Bam J

A.

## Introduction

1. This is an application for leave to appeal the order of this court of 6 September 2021. The order was granted unopposed. The application for leave to appeal was lodged on 26 October 2021 along with an application for condonation. Both applications for leave to appeal and condonation are opposed. Since the application for leave can only be entertained upon condonation being granted, it is wise to first consider the application for condonation.

### B. Condonation

2. It is now established law that the test for condonation is the interest of justice. The point is espoused in *Nair v Telkom SOC Ltd and Others*, where the Court relied on the decision of *Melane v Santam Insurance Co. Ltd* 1962

- (4) SA 531 (A) at 532 C - F:

*“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion ...”*[1]

3. In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*:

‘It is first necessary to consider the circumstances in which this Court will grant applications for condonation for special leave to appeal. This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant’s explanation for the delay or defect.’[2]

4. The affidavit in support of the application for condonation is deposed to by the second applicant. From what I could glean of the details, a great deal of time was lost based on the withdrawal of legal representatives owing to the applicants' precarious financial position. It appears that at some point, the applicants regained financial strength and sought assistance from their erstwhile attorneys. Those attorneys were later replaced by another firm of attorneys. The applicants submit in their heads of argument that their application has prospects of success. I am of the view that the application has prospects of success. It is in the interests of justice that condonation be granted.

#### C. Leave to appeal

5. Leave to appeal is governed by the provisions of Section 17 (1) (a) (i) and (ii) of the Superior Courts Act[3]. The applicants' grounds are set out in their Notice of Application for leave to appeal and may be summarised as follows: (i) The court erred in granting summary judgement, in circumstances where the respondent had sought to invoke the acceleration clause without cancelling the underlying credit agreement. (ii) The debt relied on for summary judgement is not a liquidated debt since it carries legal costs and interests attributed to such legal costs.
6. The test as to whether a court should grant leave to appeal is set out in MEC for Health, Eastern Cape v Mkhitha and Another:

'Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable

prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard. An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal. [18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met....'[4]

7. In Ramakatsa and Others v African National Congress and Another, it was said that:

'Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable

prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that

‘but here too the merits remain vitally important and are often decisive’.[5]

#### D. Grounds of Appeal

The incompetence of invoking the acceleration clause without cancelling the credit agreement

8. The applicants submit that this court erred in granting summary judgment, in circumstances where the respondent had invoked the acceleration clause without cancelling the underlying credit agreement. I have carefully weighed the applicants’ submissions and considered the papers filed of record by the respondent. The jurisdictional requirements for invoking the acceleration clause are set out in the plaintiff’s particulars of claim[6]. It follows that another court would come to a different decision on the same issue and that leave to appeal should be granted.

#### E. Order

9. The application for leave to appeal to the Full Court of this Division succeeds.

BAM NN J

JUDGE OF THE HIGH COURT, PRETORIA

Date of Hearing:

01 November 2023

Date of Judgement:

13 November 2023

Appearances:

Applicants: Adv X van Niekerk Instructed by: Pistorius Scheepers Attorneys Hatfield, Pretoria

Respondent: Adv M Rakgoale Instructed by: Vezi & De Beer Inc Lynnwood, Pretoria

[1] (JR59/2020)

[2021] ZALCJHB 449 (7 December 2021), paragraph 13

[2] (CCT45/99)

[2000] ZACC 3; 2000 (5) BCLR 465; 2000 (2) SA 837 (CC) (30 March 2000), paragraph 3

[3] 10 of 2013

[4] (1221/2015)

[2016] ZASCA 176 (25 November 2016) at paragraphs 16,17 and 18

[5] (724/2019)

[2021] ZASCA 31 (31 March 2021), paragraph 10

[6] Caselines A8 - paragraph 6.9

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Prepared on 9 October 2026 · Esheria