

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Birch and Others (2667/2018) [2019] ZAECHGC 134 (17 December 2019) [2019] ZAECHGC 134

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe

CASE / FILE NUMBER

2667/2018

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE
DIVISION, GRAHAMSTOWN)

Case

No: 2667/2018

In

the matter

between:

FIRSTRAND
BANK LIMITED
Applicant
And
SIDNEY
BONNEN BIRCH
First
Respondent
NEIL
LAWRENCE DUGMORE PIKE N.O.
Second
Respondent
KEVIN

JEAN VAN HUYSTEEN N.O.

Third

Respondent

EDWARD

SIDNEY BIRCH N.O.

Fourth

Respondent

HELEN

BIRCH

N.O.

Fifth Respondent

(The

Second to Fifth Respondents are cited in their capacities as the Trustees for the time being of THE TED AND HELEN BIRCH – SIDNEY TRUST, registration number TM462)

JUDGMENT

BESHE J:

[1] This is an application for an order in the following terms:

“1. That the First Respondent be declared a vexatious litigant in terms of Section 2(1)(b) of the Vexatious Proceedings Act, 3 of 1956 (“the Act”) and that no legal proceedings shall be instituted by the First Respondent against the Applicant in any Provincial or Local Division of the High Court of South Africa or any inferior court, without the leave of that court, or any Judge of the High Court, as the case may be.

2. That the Second to Fifth Respondents (acting in their representative capacities as trustees for the time being of the Ted and Helen Birch – Sidney Trust, registration number TM462) be declared vexatious litigants in terms of Section (2)(1)(b) of the Act, and that no legal proceedings shall be instituted by the Second to Fifth Respondents against the Applicant in any Provincial or Local Division of the High Court of South Africa or any inferior court, without the leave of that court, or any Judge of the High Court, as the case may be.
3. That the Registrar of the Court shall cause a copy of the order to be published in the Government Gazette.
4. That the Respondents, jointly and severally, the one paying the others to be absolved, be ordered to pay the costs of this application.
5. That such further and/or alternative relief be granted to the Applicant as this Honourable Court may deem fit.”

PARTIES

- [2] As the appellation suggests, the applicant is a registered bank in accordance with the laws of the Republic of South Africa. The first respondent is an adult farmer and businessman who resides at farm Van Aardts Kraal, Middleton Eastern Cape. The rest of the respondents are trustees for the time being of the Ted and Helen Birch – Sidney Birch Trust.

RELIEF SOUGHT

- [3] The court is required to determine whether the first respondent/s can be declared vexatious litigant/s as provided for in Section 2 (1) (b) of the Vexatious Proceedings Act[1] which provides:

“(b) If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that other person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of that court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings.”

- [4] The applicant seeks to prevent the first respondent in his personal capacity as well as the remaining respondents on their official capacities from instituting any legal proceedings in any High Court or lower court without leave of the court concerned. This remedy is also available at common law under the rubric that a court has the inherent duty to regulate its proceedings. As well as on the acknowledgement that a litigant is entitled to protection against repeated unsuccessful proceedings against it concerning the same dispute.

FACTS

- [5] It appears to be common cause between the parties that they concluded an agreement in terms of which the first respondent was afforded short term credit facilities by the applicant in December 2009. During the same month, the applicant loaned and advanced an amount of R1 360 000.00. For purposes of the credit facilities extended to the first respondent, the trust of which the second to fifth respondent are trustees signed a surety for first respondent's debts in favour of the applicant. To this end the trust registered a bond over certain immovable property belonging to the trust in favour of the applicant.
- [6] According to the applicant, first respondent breached the terms of both agreements.
- [7] To cut a long story short, litigation was instituted by the applicant for the recovery of its monies from the respondents. By agreement between the parties, the following order was issued by Sandi J on the 13 December 2012:

“1. THAT the Respondent in case number 1050/2011 and the Defendants in their official representative capacities in case number 1415/2012 shall jointly and severally pay the Applicant:

- a. the amount of R2 500 000.00 together with interest at prime (currently 8.5%) per annum calculated daily and compounded monthly in arrears from 7th December 2012 to date of payment, both days inclusive by way of:
 - b. an instalment of R100 000.00 on or before 31st January 2013;
 - c. an instalment of R243 113.54 on or before 28th February 2013;
 - d. seven equal instalments of R343 113.54 payable at three monthly intervals commencing on or before 7th June 2013 and thereafter on or before 7th September 2013; 7th December 2013; 7th March 2014; 7th June 2014; 7th September 2014 and 7th December 2014.
2. THAT should Respondent and the Defendants fail to make payment of any instalment envisaged in paragraph 1 hereof, and fail to do so within seven days after receipt of written notice calling upon him to so, the full outstanding balance will immediately become due and payable.
 3. THAT the Respondent and defendants shall make payment of Applicant’s party and party bill of costs, to be taxed or agreed.
 4. THAT it is recorded that the obligations set out in paragraphs 1, 2 and 3 above are in full and final settlement of any and all obligations of the above Respondent to the Applicant in respect of account no: 400[...] and 620[...] and defendants (in their official representative capacities) to the Applicant in respect of its suretyship.
 5. THAT it is recorded that Respondent retains the right(s), subject to prescription, to institute legal proceedings against Applicant pursuant to the alleged damages occasioned by the fire at Van Aardtskraal Farm, Middleton, Eastern Cape in September 2010.”

APPLICANT’S COMPLAINT

- [8] Consequent upon respondents’ failure to abide by the terms of Sandi J’s order, applicant sought to have the trust’s immovable property declared executable in June 2015. This elicited two applications for the rescission of Sandi J’s order that were issued in August 2015. This, after part compliance with Sandi J’s order by making certain payment. The rescission applications were based on the ground that the respondents (applicants for rescission)

suspected that the debt in respect of judgment that was consented to resulting in Sandi J’s order, was securitized by the applicant. And that therefore the applicant lacked the necessary locus standi to seek judgment against the respondents in respect of the said debt.

- [9] These applications were followed by a “notice to produce documents”. First respondent sought the production, for inspection inter alia, transaction documents between applicant and their securitization participants, securitization register etc.

- [10] The rescission applications mentioned above were dismissed with costs. The “notice to produce documents” was declared an irregular step (per Revelas J).
- [11] The respondents sought leave to appeal against Revelas J’s decision – this application was dismissed. So was the application for leave to appeal to the Supreme Court of Appeal. Leave to appeal was also sought from the Constitutional Court. That too was also turned down.
- [12] During November 2017, the respondents launched a second set of rescission applications raising the same arguments as with the first set of rescission applications. They however did not attend to the setting down of these applications – they are technically still pending.
- [13] In the meantime the applicant pursued its execution application. Same was scheduled to be heard on the 28 June
2018. Four days prior to that on the 25 June 2018 the trust in question brought an ex parte Anton Piller application against the applicant seeking access to the latter’s premises for purposes of searching for documents / records. Respondents also sought to interdict the applicant from proceeding with the execution application until such time that it proves its locus standi in such proceedings. The Anton Piller application served before Beneke AJ who refused it.
- [14] The application to declare the trust’s immovable property was granted by Mageza AJ.
- [15] Throughout the attempts by the respondents to avoid / resist Sandi J’s judgment taking effect, they raised the complaint or to suspicion about lack of locus standi on part of the applicant – based on a suspicion that the debt in question had been scrutinised. At every such attempt, the argument was jettisoned or rejected.
- [16] Applicant’s assertion is that from the chronology of events outlined above, it is clear that the respondents

are continuing to relentlessly seek the setting aside of Sandi J’s order on the basis of a suspicion of securitization of the debt in question. That this is without reasonable grounds and in pursuance of ill-conceived vexatious proceedings against the applicant. And that as a result it harbours an apprehension that the respondents will continue to do so in a bid to ensure that Sandi J’s order is not given effect to.[2] And accordingly pleads for protection from respondents’ unmeritorious persistent litigation.

RESPONDENTS’ OPPOSITION

- [17] The answering affidavit was deposed to by first respondent on behalf of all the respondents. From the outset he makes the point that the respondents are considering requesting certain documents and information from the applicant – to be supplied voluntarily or “by order of court”[3] whereupon they reserve the right to supplement their papers. First respondent complains that applicant conflates matters that involve

the trust in which he is not involved and those that involve him for purposes of these proceedings. He denies that he is a vexatious

litigant having only been involved in litigation against the applicant in an application where an attempt was made to sequester

him.

[18] In respect of the trust he asserts that it was involved in five applications, four of which were instituted by the applicant. The only one instituted at the instance of the trust was the Anton Piller application. And even that was ex parte. He denies that the applicant is entitled to the order is seeks. And further that by granting the applicant the relief applicant seeks, the court will be violating or denying the respondents of their Constitutional right of access to court. This access is required in order for the respondents to exhaust all avenues available to them in a bid to resist the proceedings instituted against them by the applicant. Which the respondents have sought to do. He denies that the respondents initiated frivolous litigation against the applicant. Adding that it is the applicant who is guilty of such conduct. Then at paragraph 22.9 – 22.10 of the answer the following is stated:[4]

“22.9 In any case, the Respondents have a constitutional right to take whatever action at its disposal to save the property from being declared executable, especially due to the fact that all of the proceedings to date against the Respondents by the Applicant are considered by the Respondents as being void ab initio and they are entitled to disregard the orders without the necessity of a formal order setting them aside.

22.10 All the proceedings to date before the Honourable Court, initiated by the Applicant, and defended/appealed by the Respondents are therefore void and a nullity in law with no force and effect and cannot even be considered in the Honourable Court’s deliberations as to whether or not to grant the order sought by the Applicant in this application.”

In the paragraphs that follow, first respondent goes on a tirade about how the applicant still has to show that he possesses the necessary locus standi in respect of the claim in question and goes on to deal with the merits of applicant’s original claim.

[19] It is clear from the foregoing, which does not include all the allegations respondents make in this regard, that as far as the respondents are concerned, the matter is far from over. Even the pronouncements by various courts in this division, the Supreme Court of Appeal and the Constitutional Court, signalling the end of the road for the respondents as far as applicant’s

action is concerned, are not going to discourage the respondents from instituting litigation in this regard. This is clear from the contents of an email addressed to applicant’s attorneys on the 8 October 2018 entitled: Further Request for Documentation, Records and Information. The email sent by first respondent records the following:

“Dear Sirs/ Mesdames

It is considered prudent at this point to advise that the Ted and Helen Birch – Sidney Trust and myself consider all court orders granted to date; until the contrary is proven; to be void ab initio.

This view point has been supported by your latest Application to have our litigation declared vexatious for the purpose of preventing the compelling of your Client to provide documentation, records and information, exclusively in their possession and control, which would determine their locus standi; without which they had no ability to have brought any of the prior applications and thereby utilising the rules of the High Court to prevent us from utilizing Court Processes in order to compel them to produce.

In light of the above, we provide your Client a further opportunity to be transparent to the Honourable Court and ourselves to prove their locus standi herein by supplying documentation, records and information; failing which we shall be approaching the Honourable Court to compel same, until such occurrence we will not be in a position to file composite and complete papers in opposition to your latest application. In that regard, we reserve our rights to file supplementary papers in addition to the Answering Papers being filed later today, upon receiving such documentation, records and information.

We request that you obtain instructions from your Client in respect of the above and revert in that regard by the close of business on the 10th instant by return E-mail.

Yours Sincerely

Sid Birch”

[20] In argument, respondents submit that the Act does not apply to the respondents who are only defending litigation

instituted by the applicant. Further that the respondents’ conduct does not fit the description of “manipulating the

function the functioning of the courts so as to achieve a purpose other than for which the courts are designed”. It was also

argued that the respondents who have not launched as many proceedings as was the case in the matters cited by the respondents. Being 45 in one matter, 6, numerous, 9 and 25 in other matters. That in casu respondents do not qualify to be categorized as vexatious litigants. That theirs was ordinary litigation – falling within the normal or ordinary.

DISCUSSION

[21] Section 34 of the Constitution provides that:

“Access to courts

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, another independent and impartial tribunal or forum.”

In *Beinash and Another v Ernst & Young and Others*[5] the court highlighted the purpose and the effect of Section 2 (1) (b) of the Act and concluded that the limitation of the right of access to court is reasonable. It is apposite in my view to quote what the court stated in this regard because it is instructive:

“[15] In order to evaluate the constitutionality of the impugned section, it is necessary to have regard to the purpose of the Act. This purpose is ‘to put a stop to persistent and ungrounded institution of legal proceedings’. The Act does so by allowing a court to screen (as opposed to absolutely bar) a ‘person (who) has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court’. This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings.

[16] The effect of s 2(1)(b) of the Act is to impose a procedural barrier to litigation on persons who are found to be vexatious litigants. This serves to restrict the access of such persons to courts. That is its very purpose. In so doing, it is inconsistent with s 34 of the Constitution, which protects the right of access for everyone and does not contain any internal limitation of the right. The barrier which may be imposed under s 2(1)(b) therefore does limit the right of access to court protected in s 34 of the Constitution. But, in my view, such a limitation is reasonable and justifiable. Section 36 of the Constitution provides:

‘(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including–

- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in ss (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.’

It is therefore necessary to conduct the limitations analysis required by the section, as explained in the judgments of this Court.”

[22] Has the applicant made out a case for protection against being victim of “vexatious litigation” by the respondents?

- [23] The respondents may have been justified in instituting the first set of rescission applications. In dismissing the applications, Revelas J stated that “securitization as a defence raised by defaulting debtors in terms of a loan agreement, was dismissed for a lack of proof that it had occurred”. Revelas J gave examples of cases decided in the division and in other divisions where this was the case. Leave to appeal against this judgment was not only dismissed by Revelas J. It was also turned down by the Supreme Court of Appeal, once again by the Supreme Court of Appeal upon application to the President of the Supreme Court of Appeal for the reconsideration of the earlier order dismissing the petition to the Supreme Court of Appeal and by the apex court, the Constitutional Court.
- [24] This however did not stop the respondents from instituting yet another set of rescission applications where they raised the same arguments as with the first rescission applications. This application, as stated, is still pending. Other attempts were made to get applicant to produce “documents” and prove its locus standi. For example the Anton Piller application before Beneke AJ. In the matter that served before Mageza AJ – in a bid to resist the execution of the trust’s immovable property, the respondents tried to raise the same defence as it had done previously.
- [25] In both instances respondents were unsuccessful. In the matter before Mageza AJ the applicant succeeded in having the trust’s immovable property declared executable. Beneke AJ found that the matter was res judicata and dismissed the Anton Piller application.
- [26] As I pointed out earlier, notwithstanding all these pronouncements, the respondents have vowed to persist in demanding that applicant proves that it has the necessary locus standi in respect of the debt in question. Saying in no uncertain terms that they consider the orders issued by courts in this matter as being void ab initio and deserving of being ignored. This makes it plain that the respondents are adept at forging ahead with litigation to have applicant to prove that it has the necessary locus standi. That it has not securitized the debt concerned. Not because they have evidence to this effect but because of a suspicion they harbour.
- [27] In my view, this is an appropriate case where the court should intervene to protect the applicant against the sustained endeavours, which appear to be aimed at avoiding the effect of Sandi J’s order. It is not as though the respondents will be denied access to courts. They can still institute legal proceedings against the applicant – but only with the leave of the court concerned.
- [28] Accordingly, there will be an order in terms of prayers 1 – 4 of the applicants Notice of Motion.

NG BESHE

JUDGE OF THE HIGH COURT

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Date Heard

: 14 November 2019

Date Reserved : 14 November 2019

Date Delivered

: 17 December 2019

[1] Act 3 of 1956.

[2] Paragraph 62 and 63 of Founding Affidavit, page 22 of the record.

[3] Paragraph 6 of Answering Affidavit, page 127 of the record.

[4] Page 134 of the record.

[5] 1999 (2) SA 116 CC at 122 – 123.

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