

SOUTH AFRICA / JUDGMENT

Knoesen and Others v Absa Bank Limited (1187/2015) [2020] ZAFSHC 138 (25 June 2020)

[2020] ZAFSHC 138

COURT

Free State High Court, Bloemfontein

BEFORE

P.J. Loubser

CASE / FILE NUMBER

1187/2015

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Case

number: 1187/2015

In

the matter between:

WILLEM
DANIEL
KNOESEN First
Defendant
JOHANNA
CORNELIA
KNOESEN Second
Defendant
WILLEM
DANIEL KNOESEN
N.O. Third
Defendant
JOHANNA
CORNELIA KNOESEN
N.O. Fourth
Defendant
and
ABSA BANK
LIMITED Plaintiff
HEARD

ON: 19 JUNE 2020

JUDGMENT

BY: LOUBSER, J

DELIVERED ON: 25 JUNE 2020

- [1] This is an application for leave to appeal against the judgment of Morobane, AJ delivered on 19 August 2019. The application is accompanied by an application for condonation for the late filing of the application for leave to appeal. The parties are cited as they were in the civil action for the sake of convenience.
- [2] It is trite law that in applications for condonation, the applicant must provide the court with a reasonable explanation for the delay, and it must be shown that the applicant has reasonable prospects on appeal.
- [3] As for a reasonable explanation for the delay, the defendants point out that their attorney only received the judgment in question on 5 September 2019 when he discovered it in his pigeon hole at the High Court. The time for filing an application for leave to appeal expired on 9 September 2019. The application only came to be filed on 18 September 2019, which was seven days late.
- [4] It is common cause that the defendants, including their attorney, provided no explanation at all for the delay during the period 5 September 2019 to 9 September 2019. The only explanation offered was that the attorneys were not notified of the date on which the judgment was to be delivered, and that it was only found on 5 September 2019 that it was already delivered on 19 August 2019. Mr. Janse van Rensburg, appearing for the defendants, urged the court to have an understanding for the fact that a mere four days afforded the attorneys very little time to consider and prepare the application for leave to appeal.
- [5] That may be so, but the only problem with that suggestion is that it is not dealt with in the application papers. It therefore cannot be said that a reasonable explanation for the delay was provided by the defendants. On the other hand, the delay of only seven days may not be regarded as that serious should it be found that the defendants have shown reasonable prospects of success on appeal. This is so, because the factors that a court will consider in exercising its discretion, are not always individually decisive but must be weighed the one against the other.
- [6] It appears from the judgment of Morobane, AJ that the defendants have entered into a written agreement with the plaintiff for an overdraft banking facility for the first defendant. The parties also concluded written mortgage bonds in terms of which the plaintiff lent and advanced certain amounts of money to the defendants. The defendants failed to make punctual payments of all the monthly instalments payable. Eventually, on 18 August 2011 the Magistrate's Court issued an order in terms of which the obligations of the defendants to the

plaintiff and other creditors were re-arranged. When the defendant again failed to make payment in terms of the court order, the plaintiff sent them a notice in terms of Section 88(3) of the National Credit Act 34 of 2005 to terminate the re-arrangement agreement. The full amount owing by the defendants then became due and payable. The plaintiff proceeded to issue summons against the defendants

- [7] It further appears from the judgment that the agreement between the defendants and the plaintiff was not in contention at the trial, but only the terms thereof. More importantly, the defendants denied that they were in default of the payments. For that reason the plaintiff presented the evidence of two witnesses to prove that the defendants had failed to pay to the plaintiff in terms of the order made by the court. The trial court found these witnesses to have been honest and truthful.
- [8] One of the witnesses who testified for the plaintiff told the court that he did not have knowledge of whether the defendants had diligently made payments to the payment distribution agent, and that he accordingly could not dispute the same. At the end of the plaintiff's case, the defendant applied for absolution from the instance on the basis of the evidence by the witness just mentioned. The court dismissed the application, whereafter the defendants closed their case without presenting any evidence. The trial court granted judgment in favour of the plaintiff and declared certain immovable property of the defendants specially executable.
- [9] In making submissions relating to the prospects of success on appeal, it was contended on behalf of the defendants that there was no proof in the trial court that the defendants have defaulted on the restructured payments to the plaintiff. It was contended that the plaintiff should have called the payment distribution agent to satisfy the court that the defendants have not paid to him what was due to the plaintiff. This was necessary, because the crux of the matter was whether the restructuring order was breached, it was submitted.
- [10] I cannot agree with this submission. A credit provider in cases like the present, only need to satisfy the court that he has not received the instalments as specified in the rearrangement order. Once he has done that, the defendant has to discharge the onus of rebuttal, especially where it is his case that he has made punctual payments to the payment distribution agent. In the unreported case of *Standard Bank of South Africa Ltd v Welsh* 2012 JDR 1915 (ECP) Tshiki, J remarked that it is not the duty of the plaintiff to ensure that the defendant pays the correct amount in terms of the

court order, but that of the defendant to ensure that the distribution agent pays to the plaintiff what is due to it in terms of the order.

- [11] The defendants in the present case should therefore have presented some evidence to show that they have paid punctually, but that their payments did not reach the plaintiff via the distribution agent. On this point, the defendants have no reasonable prospect of success on appeal.

[12] In my view, the other issues raised by Mr. Janse van Rensburg also did not advance the prospects of the defendants. For instance, the fact that the credit agreement was apparently only signed by the first defendant and not co-signed by the second defendant with whom he is married in community of property, does not carry any weight in view thereof that the existence of the agreement was common cause between the parties on the pleadings. The arguments raised in respect of sections 86(10) and 88(3) of the National Credit Act are mostly without substance. The Constitutional Court has stated in *Ferris and Another v Firststrand Bank Ltd* 2014(3) SA 39 CC that a credit agreement is enforceable without further notice once a debt rearrangement order is breached. The credit provider need not give notice of termination of debt review before doing so.

[13] The defendants have therefore failed to provide a reasonable explanation for the default, and they have not shown any reasonable

prospect of success on appeal.

[14] The following order is made:

1. The application for condonation for the late filing of the application for leave to appeal is dismissed with costs.
2. It follows that leave to appeal is not granted.

P.J. LOUBSER, J

For the Defendants: Adv. F.G. Janse van Rensburg

Instructed by: Bekker Attorneys

Bloemfontein

For the Plaintiff: Adv. J.H. Els

Instructed by: Phatshoane Henney Inc.

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