

SOUTH AFRICA / JUDGMENT

Mazibuko v Standard Bank of South (79372/2014) [2017] ZAGPPHC 460 (1 June 2017) [2017] ZAGPPHC 460

COURT

North Gauteng High Court, Pretoria

BEFORE

Rajab-Budlender

CASE / FILE NUMBER

79372/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 79372/2014

DATE:

01/06/2017

In

the matter between:

JM

MAZIBUKO

Applicant

And

STANDARD

BANK OF SOUTH

AFRICA

Respondent

JUDGMENT**ON LEAVE TO APPEAL****RAJAB-BUDLENDER AJ**

1 The Applicant seeks leave to appeal against the judgment and order delivered on 31 August 2016.

2 During the hearing of the leave to appeal, the Applicant's counsel confirmed that leave to appeal was not sought in relation to paragraph 1 of the order, which directed that the matter be postponed so that an interested third party (who currently owns the property concerned) could be joined.

3 Instead, the Applicant seeks leave to appeal only against paragraph 2 of the order and does so on two grounds:

3.1 First, he contends that the summons initiating the default

judgment application was not properly served and that in determining this issue, this Court took into account facts which were not known to the court hearing the default judgment application. In particular, counsel for the applicant for leave to appeal submitted that, in finding that service had been properly effected, this Court wrongly took into account a return of service and affidavit deposed to by the Sheriff, which were filed after the original service was effected.

3.2 Second, he deals with the question of compliance with

section 129 and 130 of the National Credit Act 34 of 2005 ("the National Credit Act."). In this regard, the argument is that I held that the Respondent failed to comply with the National Credit Act because less than 10 days expired before the summons was issued, but that I then erred in failing to rescind the default judgment on this ground alone.

Service

4 In relation to service, the application for leave to appeal appears to proceed from a misconception, namely that my judgment finally decided whether the summons had been properly served.

5 It did not do so. Instead, although I made certain (effectively obiter) remarks about service, in my order I merely postponed the rescission application to allow what I considered was the necessary joinder of the current owner of the property.

6 It is trite that an appeal lies against the order of a court, not its

reasons.

See: ABSA Bank Ltd v Mkhize 2014 (5) SA 16 (SCA) at para 64. Even on the assumption that the applicant's contentions regarding service were well-founded, this would not result in any different order to that which I granted. As I have indicated, I merely postponed the matter so that the current owner of the property could be joined.

7 The Applicant for leave to appeal does not contend that the postponement for this purpose was wrongly granted or that the order of joinder is in fact appealable.

8 The debate about service therefore cannot justify leave to appeal being granted. Once the joinder is effected, and the rescission application ultimately proceeds, the court hearing that application will be at liberty to make whatever finding it deems appropriate on the question of service. Compliance with the NCA

9 The second ground of appeal involves a similar misconception. The Applicant for leave to appeal is incorrect to contend that I made a finding in relation to whether section 129 and 130 of the National Credit Act had been complied with. That is not correct. Although I summarised the competing contentions on section 129 and 130 of the Act, I did not decide the issue.

10 Instead, the judgement and the postponement order leaves this issue (along with the service issue) for a future court to determine, after the necessary joinder of the current home owner had been effected.

11 However, I do accept that the Applicant has identified a potential

difficulty with paragraph 2 of the order. In view of the fact that I did not decide the issue of compliance with section 129 and 130, it seems to me that the Applicant may well be correct that I ought not to have made any order in regard to the need or opportunity for the Respondent to "correct deficiencies" in the service of the notices. The Applicant may well be correct that the appropriate order then was simply to have postponed the matter sine die to allow for the necessary joinder.

12 I therefore consider that there are reasonable prospects that another court would come to a different conclusion in relation to paragraph 2 of my order and will therefore grant leave to appeal to the Full

Bench of this Court in this regard.

13 I would add only the following, purely in the interests of achieving a speedy and effective resolution of this matter for all concerned. It seems to me that, were the Respondent to abandon paragraph 2 of the Order, that may well allow for the third party to be joined and for the rescission application to proceed on its merits. The Applicant and Respondent would then each be entitled to argue their case on rescission in full, including the debate about section 129 and 130 of the National Credit Act and my judgment would not bar them from doing so. Whether the Respondent seeks to adopt this route is of course for it to determine and I make no finding on what the effect of it doing so would be.

Order

14 In the main judgment, I held that each party should pay its own costs. I see no reason to depart therefrom for purposes of this application for leave to appeal.

15 In the circumstances, I make the following order:

15.1 Leave to appeal is granted to the Full Bench of this Court in relation only to paragraph 2 of the Order of this Court.

15.2 Each party to pay its own costs.

N. RAJAB-BUDLENDER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

Date of Judgment:

29 May 2017

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