

SOUTH AFRICA / JUDGMENT

Mokoena v Firstrand Bank Limited t/a Wesbank (A5011/18) [2019] ZAGPJHC 142 (9 May 2019) [2019] ZAGPJHC 142

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mudau, Sutherland, Matsemela

CASE / FILE NUMBER

A5011/18

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

CASE NO: A5011/18

7/5/2019

In the matter between:

MOKOENA, MASHILO EPHAPHRUS

APPELLANT

and

FIRSTRAND BANK LIMITED T/A WESBANK

RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] This appeal, with leave of the court a quo, arises from summary judgment proceedings in this court (Sibuyi AJ). The respondent, FirstRand Bank Limited trading as Wesbank (the bank), launched an application which was granted in terms of Rule 32 of the Uniform Rules of Court for the return of a motor vehicle in circumstances where the appellant was allegedly in breach of the instalment sale agreement.
- [2] The appellant, an attorney, appeared in person to argue his case.
- [3] The appeal concerns distinct issues. First, whether the appellant has shown good cause for condonation and reinstatement of the appeal, which has lapsed in terms of Rule 49 (6) (a). Second, whether the debt rearrangement order granted by the Bloemfontein magistrate's court is invalid. Thirdly, whether the respondent was required to give notice in terms of section 86 (10) of the National Credit Act ("NCA") [1] before issuing summons. Fourthly, whether the defence raised by the appellant in summary judgment proceedings was bona fide.
- [4] The appellant failed to comply with the requirements of Rule 49(6) (a) and (b), read with Rule 49(7) (a) (ii) of the Uniform Rules of Court, in that he failed to make written application to the registrar of this court for a date for the hearing of this appeal within sixty
- (60) days of the delivery of his notice of appeal. This resulted in his appeal lapsing.
- [5] Rule 49(7) requires the appellant, at the same time as the application for a date for the hearing of the appeal in terms of Rule 49(6) (a), to file with the registrar three (3) copies of the record on appeal and furnish two (2) copies to the respondent. It further provides that if the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.
- [6] The appellant's notice of appeal was delivered on 8 March 2018, while his application for a hearing date was only delivered on 22 January 2019. The sixty days within which the appellant was to bring his application for a hearing date lapsed on 7 June 2018, which is the date on which the appeal is deemed to have lapsed in terms of Rule 49(6) (a). The appellant's application for a hearing date was therefore more than seven (7) months later than permissible.
- [7] It is trite that an appellant should, whenever he realises that he has not complied with a rule of court, apply for condonation without delay.[2] A court considering an application for condonation and when exercising its discretion must take into account a range of considerations. Relevant considerations include the extent of non-compliance and the explanation given for it; the prospects of

success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the court and the avoidance of unnecessary delay in the administration of justice.[3] These factors are not individually decisive but are interrelated and accordingly, must be weighed one against the other. In *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*[4], the Constitutional Court stated that the standard for considering an application for condonation is the interests of justice. It further went on to state that an applicant for condonation must give a full explanation for the delay which must not only cover the entire period of the delay but must also be reasonable.[5]

[8] The appellant filed an affidavit in support of an application for reinstatement and condonation regarding the appeal. He alleges in his affidavit, that the delay from the period 7 June 2018 until 4 December 2018 is attributable to the negligence of the transcribers

of the record who had been requested to attend to the transcription of the court proceedings in the court a quo. On 4 December 2018 he threatened to take legal steps against the transcribers. On the same day, he received a transcribed record of the proceedings. The transcriber's certificate shows that the CD ordered for transcribing was received on 1 June 2018 and completed on 2018/04/04.

Considering the size of the record of proceedings, which is small, it is reasonable to infer that the transcription process took until 4 June 2018 and that the date of 4 June 2018 is a typographical error. Nothing turns on this. Significantly, the record was ready since early June 2018. A matter of some significance is that what the transcribers produced was the argument exchanged during the hearing of an application. This was wholly unnecessary as it contributed nothing to the appeal. The 'record' is the evidence adduced, in this case, by way of the court process in the form of affidavits. The delay insofar as it was directly attributable to a transcript of the argument, is an abuse of the court process.

[9] It was only on 12 December 2018 that he informed the respondent's attorneys of this fact and received a reply on 11 January 2019 which he attributed to the festive period on their part. Thereafter, he briefed counsel, a Mr Lebea, to attend to the drawing up of the application for reinstatement and condonation, heads of argument and practice note. By 15 January 2019 Mr Lebea had failed in this regard. On 18 January 2019 until 21 January 2019 he embarked on this exercise.

[10] The explanation proffered by the appellant was attacked by Mr Nxumalo, counsel for the respondent, on the basis that there is no explanation given to cover the period 1 June 2018 and 6 September 2018. There were no efforts by the appellant to compel the transcribers to provide him with the record from March 2018 to December 2018. This criticism is not without merit. The appellant has failed to provide an explanation that covers the entire period of his delay. The appellant has failed to attach any supporting affidavit by the transcribers. He has also failed to attach an affidavit by Mr Lebea, the advocate that he blames for the delay between 11 January 2019 and 18 January 2019 or to provide an explanation why the aforesaid affidavits could not be obtained.

- [11] It is trite that where a party alleges that the cause of the delay has been due to the mistake or default of a third party, there should be an affidavit by such party.[6] The convention of the Bar is that advocates do not depose to affidavits in litigious matters. However, this is a general rule, not universally applicable without exception. Where Mr Lebea is alleged to be the culpable person, it was appropriate that an affidavit be obtained from him or objective evidence be adduced from which it could be inferred that Mr Lebea was indeed culpable. Neither was done.
- [12] Accordingly, the condonation application is quite clearly, without merit. The request for the transcribed record was for all intents and purposes made on 1 June 2018 as it is the date on which the appellant paid the required fees. It was ready within four days. Blaming the transcribers is a red herring. If I have erred in this regard, the merits are dealt with below.
- [13] During March 2012 the bank concluded an instalment sale agreement with the appellant in terms of which the bank sold and delivered to the appellant a motor vehicle for the sum of R 192 355-52 payable by way of a deposit of R500,00 with interest charges in the sum of R63 045-24, calculated at 14% per annum. The balance of the purchase price was payable in 72 equal monthly amounts of R2 664-66 the first of which was payable on 25 April 2012 and thereafter on the same day of each succeeding month.
- [14] It was a material term of the agreement that ownership in and to the vehicle would remain vested in the bank and would not pass to the appellant until all amounts due have been paid. The agreement made provision for the usual rights of the bank to claim from the appellant any amounts due in the event of the appellant defaulting to pay monies due, cancellation of the credit agreement and for the bank to take repossession of the car and to claim as liquidated damages the difference between the outstanding balance and the net proceeds of the vehicle.
- [15] The appellant defaulted with his repayment obligations. The allegation being that on 6 March 2014 the appellant's debt counsellor

launched an application at the Bloemfontein magistrate's court for a debt rearrangement order in terms of section 86 (7)(c) of the NCA.[7] The appellant was ordered by that court to pay a restructured instalment of R1 905, 16 per months to service the debt with the bank as a result of his over indebtedness. It is common cause that the appellant breached the debt rearrangement order in that he failed to make regular payments in accordance therewith and also in terms of the credit agreement for at least 20 business days as envisaged in terms of the provisions of section 130 (1) of the National Credit Act. As at 18 January 2016 the arrear amount was R 8 725, 56 and the balance outstanding being R 102 304, 62. As a result the bank instituted action against the appellant. The appellant entered an appearance to defend.

- [16] Upon the expiry of the dies, the bank applied for summary judgment which the appellant opposed. In his opposing affidavit the appellant did not dispute his indebtedness to the bank. He stated that, his debt counsellor, “Ian Watson” started making payments on his behalf in terms of the restructured instalment order by the Bloemfontein magistrate’s court. This is a significant averment by the appellant. He was willingly complicit in the rearrangement order and albeit for only a while met its requirements.
- [17] Despite that circumstance, he contended that the cited applicant, ‘Debtbusters Debt Counsellor’, who launched the application supposedly on his behalf, is not ‘Ian Watson’, and “definitely not a registered debt counsellor”, an unsubstantiated allegation. He subsequently terminated the services of his debt counsellor, Ian Watson, as he, so he baldly says, was unhappy with the latter’s services. The appellant attaches, “MEM 2” dated 12 May 2014, a formal notice to all credit providers and registered credit bureaus in terms of section 84 (4)
- (b) (i) (ii) of the NCA of the cancellation of the debt review. The contents of the notice are telling. Among the statements’ in the form is the allegation that the cancellation is at the express request of the appellant and furthermore that the appellant must take steps to rescind the order granted. This aspect is addressed again later in this judgment.
- [18] First, when the appeal was argued before us by the appellant, he persisted with this argument. It became clear when counsel for the bank argued in the appeal that the appellant is dishonest. MEM 2 referred to above is under a letterhead styled Debt Matters (Pty) Ltd trading as Debtbusters with registration number NCRDC 1817, and signed off by “Ian Watson”, debt counsellor NCRDC1817. This is one and the same entity. The appellant’s assertion in that regard was not only misleading, but a blatant lie in an affidavit and before this court.
- [19] Second, the appellant stated that the Bloemfontein magistrates’ court had no jurisdiction over him as he had never at any time resided, worked or conducted any business within its jurisdiction and the court order is therefore invalid. He says that since 2010 and up to this day (30 March 2016 when the affidavit was commissioned) he had always resided, worked and conducted business in Gauteng. At the time that the debt restructuring application was launched, the address he gave was 151 Calals, Von Dessin St, Montgomery Park, Johannesburg. FNB is cited as his then employer with an email address titled MMokoena5@fnb.co.za. However, the appeal papers reflect other details regarding the appellant’s addresses. How and under what circumstances this happened, is unclear and it is not addressed by the appellant. More especially, no explanation whatever is offered as to why Watson instituted proceedings in Bloemfontein. Prima facie Watson must have relied on information given by the appellant. Despite the elapse of much time no effort has been made to rescind

the order. If the appellant were to do so, he would naturally have to establish that false information was presented to that court to found jurisdiction or show that the court gratuitously assumed jurisdiction. The failure of the appellant to clarify this aspect

gives rise to an adverse inference: was this a strategy to muddy the debt recovery process?

- [20] When the appellant asked for digital audio recording transcripts the address given was, 1196 Kopano St, Lebowagkomo which is in Limpopo province. The address 5D Ramlin Square, 31 Hans van Rensburg St, Polokwane, Limpopo is reflected as an address where he runs his legal practice. The physical address provided when the agreement with the bank was entered is different, no 56 Monterrey, Montrose Avenue, Northriding, Gauteng. When the appeal was argued the address given is in Honeydew, Gauteng. A consumer is obliged in terms of section 96 of the NCA to give notice within 10 business days of such change in address to the relevant parties.
- [21] The appellant contended that the bank should have proceeded against him in terms of section 130(1) (a), read with 86(10) of the NCA, and not in terms of section 88(3) (b)(ii) of the NCA. This approach is premised on the notion that no order existed. To bolster this stance, the appellant relied on *Lewis & Marks v Middel*[8] for his contention that the Bloemfontein magistrate's court order was a nullity and therefore could be ignored without any need for judicial intervention.
- [22] After the application was heard, Sibuyi AJ concluded that the appellant had no bona fide defence to the bank's claim and granted summary judgment. Uniform Rule 32 of the Superior Courts enables the plaintiff to apply for summary judgment where the claim is: (a) on a liquid document; (b) for a liquidated amount in money; (c) for delivery of a specified movable property; or (d) for ejectment, together with any claim for interest and costs. The defendant, on the other hand, must set out a defence that is bona fide and good in law and also disclose fully the nature and grounds of his or her defence.
- [23] The legal principles governing summary judgment proceedings are trite. In *Maharaj v Barclays National Bank Ltd* (*Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426 A-D.), Corbett JA outlined the principles and what is required from a defendant in order to successfully oppose a claim for summary judgment as follows:

'...[One] of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant had "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied

upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence.'

[24] The Constitutional Court dealt with the Lewis case in the Department of Transport and Others v Tasima (Pty) Limited ("Tasima") case, where the judgment by the majority of the Judges stated the following[10]:-

"Lewis & Marks is also res judicata-oriented. The court there states that orders from proceedings with uncited parties are 'null and void: and upon proof of invalidity the decision may be disregarded . . . ' The act of proving something irresistibly implies the presence of a court. It is the court that, once invalidity is proven, can overturn the decision. The party does the proving, not the disregarding. Parties cannot usurp the court's role in making legal determinations."

[25] The obligation to obey court orders 'has at its heart the very effectiveness and legitimacy of the judicial system'. Allowing parties to ignore court orders would shake the foundations of the law and compromise the status and constitutional mandate of the courts.

The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built.[11]

[26] Section 88(3) (a) and (b) (ii) of the NCA permits the bank, where there is a re-arrangement order (such as the one made by the Bloemfontein Court) and the consumer (appellant) defaults on his obligations in terms of such re-arrangement order, to exercise or enforce by litigation or other judicial process any right or security under the credit agreement that it may have with the consumer. It is significant in this case that, the debt counsellor as the appellant's agent started and made payments to the bank in accordance with the restructured debt order. The debt counsellor could only have done this upon receipt of monies from the appellant. Put differently, the appellant complied with the Bloemfontein magistrate's court order albeit partially. The appellant submitted to the order and then unilaterally repudiated it when convenient for him to do so.

[27] The appellant whilst being aware of the Bloemfontein magistrates' court order made no effort to have it rescinded and is not interested in doing so. Quite obviously it is convenient to him. He still has the car and owes money to the bank. The defence relied upon by the appellant, that the bank should have served him with a section 86(10) notice prior to instituting action against him, is in my view purely dilatory in nature and does not deal with the merits of the matter. The defence as alleged serves merely to pause the proceedings, not to nullify them.[12]

[28] That a credit provider does not have to send any further notice to the consumer where the consumer defaults on his obligations in terms of a re-arrangement order was confirmed by the Constitutional Court in Ferris and Another v FirstRand Bank Ltd[13]. In Ferris, Moseneke DCJ, when dealing with the failure to deliver a s86(10) notice to the consumer, stated the following:

“However, even if further notice were required, its absence is a purely dilatory defence - a defence that suspends proceedings rather than precludes a cause of action -”

- [29] The approach we take is that the Magistrate’s court order remains in force until rescinded or otherwise set aside. The respondent is not to be faulted for relying on its existence to decide how to proceed further.
- [30] There are aspects of this case which are disquieting. They bear mention. First, there is the spectacle of a practising attorney who alleges he is still under debt review. We deem it appropriate that the Legal Practice Council have its attention drawn to the facts set out in the matter to enquire whether any inappropriate conduct had occurred. Second, the circumstances of the debt counsellor’s action in bringing the application in Bloemfontein require scrutiny. The National Credit Regulator ought to give attention to whether Mr Watson acted appropriately in the circumstances.
- [31] I am accordingly satisfied that the bank therefore complied with the requirements of section 88(3) (b) of the NCA before instituting

action against the appellant and was therefore entitled to the summary judgment granted by Sibuyi AJ in this court. It follows that the appeal stands to be dismissed. There is no reason why the question of costs should not follow the result.

[32] Consequently , I make the following order :

[32.1] The application for condonation is dismissed.

[32.2] The appeal is dismissed with costs on an attorney and client scale.

[32.3] Copies of this judgment should be forwarded by the registrar of this court to the Legal Practice Council and to the National Credit Regulator for further investigation as they deem appropriate. A report by each shall be furnished to the Registrar of this court within three months of the date of this order on the outcome thereof, or the progress in respect thereof.

MUDAU J

I agree

SUTHERLAND J

MATSEMELA AJ

Date of Hearing:

29 April 2019

Date of

Judgment:

9 May 2019

APPEARANCES

For the Appellant: ME Mokoena

Instructed by:

Mokoena Attorneys

081 431 0270

C/o Mhingeni Masinga Attorneys

For the Respondent: NS Nxumalo

Instructed by:

Smit Jones & Pratt

[1] 34 of 2005. Section 86

(10) reads : - “(10)(a) 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, at any time at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review in the prescribed manner to

(i) the consumer; (ii) the debt counsellor; and (iii) the National Credit Regulator; and

(b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.

[1] 34 of 2005. Section 86

(10) reads : - “(10)(a) 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, at any time at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review in the prescribed manner to

(i) the consumer;

(ii) the debt counsellor; and

(iii) the National Credit Regulator; and

(b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.

[2] Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A) at 449 G-H.

[3] Holmes JA in *Federated Employers Fire & General Insurance Co Ltd & another v McKenzie* 1969 (3) SA 360 (A) at 362F-G cited with approval in *S v Di Blasi* 1996 (1) SACR 1 (A) at 3G.

[4]

[2007] ZACC 24; 2008 (2) SA 472 (CC) para 20

[5] Van Wyk para 22.

[6] *Parker, Wood & Co v Badman* 1925 TPD 637; *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A) at 789I-790C.

[7] Section 86 (7)(c) reads:- (7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that...(c) the consumer is overindebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and (ii) that one or more of the consumer's obligations be rearranged by (aa) extending the period of the agreement and reducing the amount of each payment due

accordingly; (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; or (dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

[7] Section 86 (7)(c) reads:- (7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that...(c) the consumer is overindebted,

the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or

both of the following orders-

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and

(ii) that one or more of the consumer's obligations be rearranged by

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(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; or

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

[8] 1904 TS 291 at 303

[9] 1976

(1) SA 418 (A) at 426 A-D.

[10] 2017

(2) SA 622 (CC) para 191.

[11] Tasima para 183.

[12] Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC) para 53.

[13] 2014 (3) SA 39 (CC) para 17.

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