

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Ebrahim (28228/2019) [2020] ZAGPPHC 460 (7 August 2020)

[2020] ZAGPPHC 460

COURT

North Gauteng High Court, Pretoria

BEFORE

J Holland-Muter

CASE / FILE NUMBER

28228/2019

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED NO

Case No: 28228 / 2019

In the matter between:

NEDBANK LIMITED

Plaintiff/Respondent

and

NADIA ASHRAF EBRAHIM

Defendant/Applicant

JUDGEMENT:

APPLICATION FOR LEAVE TO APPEAL

(Judgement handed down via Email due to the Covid-19 Pandemic and subsequent directives regulating process in general in the Pretoria High Court. The judgement is deemed to have been handed down on the date of the transmission of the Emails to both parties)

- [1] This application for leave to appeal is almost like the Prodigal Son in Biblical times. The judgement was handed down on 16 January 2020 and the application for leave to appeal was filed sometime thereafter. It however went astray and only after the respondent's legal representatives enquired from this office at the end of June 2020 was it brought to my attention. A search was conducted to the whereabouts thereof and when located, a copy of the missing application was forwarded to me by the respondent's attorneys. All parties were happy that the wandering application was found and could be attended to. Being an acting Judge, the possibility of stray documents often occur and when found, all rejoiced.
- [2] All parties were relieved when the application re-appeared and I contacted both advocates who appeared at the initial hearing to determine the way forward. Mr Geach (on behalf of the applicant) indicated that his junior will attend to the requested written

submissions and Mr Roos would reply thereto afterwards. It was agreed that in view of the Covid-19 threat and current directives, a paper hearing would suffice without any physical court appearances.

- [3] Mr Keet (junior to Mr Geach) filed their submissions on 24 July 2020 and Mr Roos his on 4 August 2020.
- [4] The applicant raised three issues namely (i) the application of Section 129 of the National Credit Act, 34 of 2005 (NCA); (ii) alleged non-compliance with the prescriptions of Section 15(4) of the Electronic Communications and Transactions Act, 25 of 2002 (ECTA) and (iii) the correctness of the certificate of balance.

LEAVE TO APPEAL: SECTION 17 OF THE SUPERIOR COURTS ACT:

- [5] In terms of Section 17 of the Act, leave to appeal may only be given where a judge is of the opinion that there is a reasonable prospect of success of the requested appeal if heard by another court. The amended section raised the bar of the test that is now applied to the merits of the proposed appeal before leave be granted. See Erasmus, Superior Court Practice Vol. 1 A2-54-55. The three issues raised by the applicant will be tested against this yardstick.

Section 129 Notification:

- [6] The applicant avers that the Laudium Post Office was the "closest" post office to her. The agreement entered into provides for that the address set out in the agreement will be where the parties will accept documents and notices relating to the agreement. The address chosen is 437 Kalkheuwel Street, Christoburg. This was the address whereto the Section 129 Notice was forwarded to.
- [7] It is clear from the annexed registered slip and the "track and trace" report that the registered postal piece reached the collecting post office and the applicant was sent a notification to collect the postal piece.

- [8] The legal requirements with regard to a notification was set out in *Kubyana v Standard Bank of South Africa Ltd* 2014 93) SA 56 CC. In par 54 the CC held “it may be inferred from the fact that the Post Office sent the notification to the consumer’s correct postal address...”. It is not whether the notification actually reached the applicant or the “nearest” post office, but whether the postal piece was forwarded to the correct collecting post office and that a notification was forwarded to the consumer. The mere averment by the applicant that the Quagga Post Office is not the nearest post office to her residence cannot be seen as a rebuttal of the prima facie evidential value of the “track and trace” report.
- [9] See Hoffmann & Zeffertt, *The South African Law of Evidence* 4th ed p 596, and *Galante v Dickinson* 1950 (2) SA 460 A at 465. A party’s (the applicant) failure to testify (or to produce evidence) does not justify a verdict for the other party unless there is enough prima facie evidence to enable the court to do so. I am of the view that in this matter a verdict against the applicant is warranted.
- [10] In my view in this matter, when applying the ratio in *Kubyana* (supra), it is correct to find that the mere allegation by the applicant about the “nearest” post office did not discharge her

from the position in *Kubyana*. Experience has shown that the post office will endorse the “track and trace” report indicating whether it was returned to the central post office endorsing it as unknown.

- [11] The applicant did not go further than what was already advanced by her at the initial hearing and this ground does not pass the test in section 17 (above).

ALLEGED NON-COMPLIANCE WITH “ECTA”:

- [12] The submission by the applicant that the “track and trace” report must comply with the provisions of Section 15 of ECTA (that it constitutes a data-message and is only admissible as evidence under such circumstances) is fatally flawed by reason of the dicta in *Kubyana* (supra) where the sender is discharged from any obligation under the act. The “track and trace” report shows that a notification was sent by the post office and the creditor is discharged of his obligation. This has been the widely accepted practice in the courts. This ground also fails the test in section 17 with regard to any success on appeal.

CERTIFICATE OF BALANCE:

- [13] This ground is similarly without any prospect of success as no monetary judgement was granted based on the certificate. The order granted was for the return of the vehicle and the aspect of the balance was postponed sine die.

ORDER:

The application for leave to appeal is dismissed with costs.

J HOLLAND-MUTER

Acting Judge of the Pretoria High Court

7 August 2020

(The matter was heard before the Covid-19 Directives and therefore not loaded onto CaseLines)

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