

SOUTH AFRICA / JUDGMENT

Oosthuizen v Absa Bank Ltd In Re: Absa Bank Ltd v Oosthuizen (2062/2017)

[2019] ZAFSHC 246 (19 December 2019)

[2019] ZAFSHC 246

COURT

Free State High Court, Bloemfontein

BEFORE

Murray

CASE / FILE NUMBER

2062/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case no: 2062/2017

In the matter between:

GERRIT
OOSTHUIZEN APPELLANT
[Identity number: [...]]
and
ABSA BANK LTD
[Registration number:
1986/004794/06] RESPONDENT

In re:

ABSA BANK
LTD PLAINTIFF
GERRIT
OOSTHUIZEN DEFENDANT
HEARD

ON:

25 OCTOBER 2019

CORAM:

MURRAY AJ

JUDGMENT

BY: MURRAY AJ

DELIVERED ON: 19 DECEMBER 2019

[1] The Applicant (the Defendant in the main action) seeks leave to appeal against the whole of the 19 September 2019 judgment and order of Pohl AJ in which the Respondent (the Plaintiff in the main action) was granted judgment as if on an unopposed basis against the Applicant in the amount of R963 074.91 with interest thereon at the rate of 10.75% as from 21 August 2018 to date of payment, and costs of suit on the scale as between attorney and client.

[2] The said judgment followed upon the Respondent's debt enforcement against the Applicant by repossessing a tractor, as

contemplated in sections 127 to 131 of the National Credit Act[1] ("the NCA"). The repossession was the result of the Applicant's default on the written instalment sales agreement

which he had concluded with the Respondent for the tractor. The Respondent obtained a default order from the Registrar on 28 August 2017 which cancelled the agreement and ordered the return of the tractor, a Mega-Agri 2014 New Claas Axion 950.

[3] The Registrar granted the 2017 default judgment against the Applicant in the following terms[2]:

"1. Confirmation of cancellation of the agreement;

2. That the Defendant be ordered to return the following goods and Registration documents to the Plaintiff:

Make: Mega-Agri

Description: 2014 New Claas Axion 950 tractor

Engine nr: 00020034392

Chassis nr: ACF950CABD4WD0119

3. That leave be granted to the Plaintiff to approach the Honourable Court on the same papers, duly amplified where necessary, for Damages; [my emphasis]

4. Further and/or alternative relief."

[4] Paragraphs 1 and 2 of the Registrar's judgment therefore only ordered the cancellation of the agreement and the return of the relevant tractor to the Respondent. No 'judgment sounding in money' was granted.

[5] Paragraph 3 did not grant monetary relief, or create a ‘judgment sounding in money’ either. All it did was to grant the Respondent the right to return to court on duly supplemented papers after certain conditions have been met, to claim damages, if any, in respect of the tractor.[3] In other words, it merely granted the Respondent the right to approach the court for a judgment sounding in money and to commence with the second stage of the proceedings once the repossessed vehicle had been sold or repaired and its value determined. Implicit in such right, of course, is that whatever damages were to be claimed, would need to be proven. Which is why that stage of the default judgment needs to be adjudicated in open court.

[6] Two years after having obtained such leave, the Respondent exercised the right which it had gained from the order in paragraph 3 and commenced with the second stage of the proceedings by applying to have the damages claim adjudicated. It accordingly filed a Notice of Set Down on 21 June 2019 which read as follows:

“WHEREFORE the Plaintiff moves for Judgment against the Defendant as follows:

1. Payment of the amount of R 963 074.91;
2. Interest on the aforesaid amount at the rate of 10.75% per annum from 21 August 2018 to date of final payment;
3. Costs of suit on an attorney and client scale;
4. Further and or alternative relief.”

[my underlining]

[7] The Respondent’s Notice of Set Down was supported by a Damages Affidavit. Paragraph 2 thereof reads as follows:

“The Applicant obtained a repossession order against the Respondent under the above case number, a copy of which judgment is attached hereto marked Annexure “A”. In terms thereof, and in particular in terms of prayer 5 [sic], the Plaintiff would be entitled to approach the above Honourable Court for judgment sounding in money once its damages were quantified.” [my underlining]

[8] In view of the above, Mr Pienaar’s argument that the Respondent’s claim as set out in the combined summons (Claim 3 therein) provides for a two-stage procedure, makes sense. So does his submission that the relief sought in the Respondent’s Notice of Set Down and the Damages Affidavit is a separate distinct claim from the one that was claimed in the paragraph 3 in the Rule 31(5) application to the Registrar for default judgment. The two notices have different purposes and requests different types of relief in two distinct stages of the Default Judgment procedure.

- [9] Stage 1, introduced by the 'Notice in terms of Rule 31(5)' is the 'repossession application', which claims cancellation of the agreement, delivery of the vehicle, and leave to bring a damages application for a judgment sounding in money. Since it is based on a debt the repossession claim can be handled by the Registrar.
- [10] Stage 2 claims damages and involves judicial oversight since evidence is needed for the damages claim to be determined, and that claim therefore needs to be heard and adjudicated by a judge in open court.
- [11] The 'Notice in terms of Rule 31(5)' was therefore only the first step in the debt enforcement process, namely to create the legal right (the cancellation) to enforce the claim for repossession (the delivery of the vehicle), and to obtain the right to claim damages (the leave). The paragraph granting the right to claim damages did not have a final effect, therefore, since it was not dispositive of a substantial part of main action. It merely opened the door for an application in the second stage of the proceedings to have the damages claim adjudicated.
- [12] The Notice of Set Down then introduced the said second stage which could commence only after the vehicle had been returned and the damages could be quantified by assigning a monetary value to the repossessed vehicle and subtracting that from the amount of the debt as at that time. The second stage of the default judgment proceedings then comprised of the application for and the adjudication of the claim sounding in money.
- [13] It is only logical that a defendant should then be allowed to dispute the quantification process of the damages, as Mr Heymans correctly conceded.
- [14] The Respondent relied on the application procedure for this final step. It instituted its Damages Claim by way of a Notice of Set Down supported by a Damages Affidavit. But after the Respondent's Notice of Intention to Oppose and Notice of Intention to Defend were filed, instead of amending its particulars of claim to set out the quantification procedure followed to sell the tractor and to reflect the price of the repossessed tractor and the balance allegedly still owed by the Applicant, it pursued its claim for damages still on an 'unopposed default' basis on application.
- [15] The Applicant's Notice of Intention to Oppose the damages claim, was filed late, on 15 July 2019, and so was his Notice of Intention to defend the damages claim in the Main Action, filed on 8 August 2019. But both were filed before the application for judgment sounding in money had been considered or adjudicated, therefore, in my view, before the Default Judgment's second stage had been completed.

- [16] Rule 19(5) of the Uniform Rules of Court expressly allows such notice to be delivered after the period specified in the Summons or in Rule 19(2) as long as it is done before Default Judgment had been granted. The effect of Rule 19(5) is that the late delivery of a notice of intention to defend does not entitle a plaintiff to apply for or proceed with an application for default judgment.[4] The penalty for such late filing after the plaintiff had lodged the application for judgment by default, is for the defendant to pay the plaintiff's costs.
- [17] In my view the relevant 'application for default judgment' in this case is the application based on the claim for damages for judgment sounding in money. Since there was a Notice of Intention to Oppose as well as a Notice of Intention to Defend, both delivered after the application for damages was filed, but before the judgment sounding in money was granted on 19 September 2019, the claim for damages (Claim 3 in the particulars of claim), in the main action should have proceeded on a defended basis.
- [18] I do not agree that the Applicant had to have had the Registrar's Default Judgment of 2017 set aside first if it wanted to defend the damages part of the claim. Paragraph 3 of that order did not have the effect of a final judgment. As stated above, in my view it merely enabled and introduced the second stage of the default judgment procedure, namely the quantification and proof of the damages claim on evidence in open court. It did not entitle the Respondent to have the claim adjudicated on an unopposed default basis.
- [19] I agree with Mr Pienaar, therefore, that the Respondent, in view of the Opposing Affidavit, was not entitled and should not have been allowed to proceed with the application for default judgment as if on an unopposed or undefended basis.
- [20] In *Baliso v Firstrand Bank Ltd t/a Wesbank*[5] the Constitutional Court stated that:
- "In terms of our civil procedure, default judgment for a debt or liquidated demand is granted on the acceptance of the allegations as set out in the summons, without any evidence. Where the claim is not for a debt or liquidated demand, the court may, after hearing evidence, grant judgment. This is usually only evidence on the amount of unliquidated damages. The reason for not hearing evidence on the other factual allegations made in the summons or particulars of claim is that, because the claim is not opposed, it may be accepted that those allegations are admitted and not disputed."*
- [21] In the present case the Applicant did indicate that he wished to oppose the claim and the allegations in the Application, and indeed filed his Opposing Affidavit to the application for judgment sounding in money. The matter could therefore not have been regarded and treated as 'not disputed' and judged as if it was unopposed.
- [22] I agree with the finding in the judgment that the amount of damages which the Court orders completes the 2017 judgment. However, the practical implication of that finding is that the 2017 judgment was only complete on 19 September 2019 when the judgment sounding in money was granted. It does not make sense, with respect, to then find in that 19 September 2019 judgment that the Defendant 'could have and should have' applied for rescission of the default judgment "if he really wanted to defend the action after default judgment was

granted, and to then use that as the basis for Court a quo's rejection of the Appellant's defence.

- [23] One of the Applicant's defences, for instance, is that the Respondent did not act fast enough to sell the tractor so that it diminished in value and the Applicant's liability for damages increased. In *Visser & Potgieter: The Law of Damages*[6] it was stated that:

"It is a recognized principle in an action for damages that a plaintiff may not recover damages for loss which is the factual result of the defendant's conduct but could nevertheless have been prevented if the plaintiff had taken reasonable steps. ... A failure to prevent the accumulation of damage can be regarded as an omission on the part of the plaintiff to take reasonable steps to mitigate the initial loss. ... A plaintiff who fails to mitigate his loss ... cannot recover damages in respect of loss that the plaintiff could reasonably have prevented."

- [24] The onus of proving that the Respondent unreasonably failed to mitigate loss rests upon the Applicant. Consequently the

Applicant may prove that the Respondent should have restricted its damage or that the Respondent should have used a better or alternative method to sell the tractor. If the Respondent has incurred expenses which the Applicant considers unreasonable,

the Applicant may show that the Respondent could reasonably have avoided the loss at a lesser expense, in which case only the smaller

amount would be recoverable.[7] That the Applicant can only do if he is allowed to oppose or defend the Respondent's quantification of the damages, which he is entitled to do.

- [25] It was submitted on behalf of the Respondent that leave to appeal would merely result in a rehash of the same arguments that have already served before the court. The Applicant has, in my view, however, raised a number of valid issues pertaining to the quantification of the damages regarding which another court may reach a different conclusion. It is evident from the case law, for instance, that the last word about the applicability of Subsections 127(2) – (5) of the National Credit Act, Act 34 of 2005, has not been spoken yet. The Court a quo relied on one decision[8] to claim that it was not applicable because the agreement had already been cancelled. Another court may reach a different

conclusion.

- [26] In *MEC for Health, Eastern Cape v Mkhitha and Another*[9] the Supreme Court of Appeal held as follows:

"[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Court Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why it should be heard"

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[27] It is my considered opinion that the Applicant would have reasonable prospects of success on appeal.

WHEREFORE I make the following order

1. The Applicant is granted leave to appeal to the Full Bench of this Court against the whole of the judgment and order granted on 19 September 2019.
2. Costs are to be costs in the appeal.

MURRAY AJ

For the Plaintiff:

Adv P J Heymans

Instructed by

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[1] Act 34 of 2005

[2] Claim 3 in ABSA's Particulars of Claim.

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- [3] Claim 3 in the Main Action.
- [4] Erasmus: Superior Court Practice Vol 2, [Original Service, 2015] at D1-248
- [5] Constitutional Court case CCT 150/15; [2016] ZACC 23 at par [12]
- [6] 3rd Ed, at 295 - 297 at par 11.3.1
- [7] Everett v Marina Heights (Pty) Ltd 1970 (1) SA 198 (C), at 201; Shrog v Valentine 1940 (3) SA 1228 (T) at 1237.
- [8] Edwards v First Rand Bank Ltd t/a Wesbank 2017 (1) SA 316
- [9] 91221/2015) [2 016] ZASCA 176 (25 November 2016) at paras [16] and [17]
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