

SOUTH AFRICA / JUDGMENT

van Coller v Firststrandbank Limited (80706/2016) [2017] ZAGPPHC 941 (12 May 2017) [2017] ZAGPPHC 941

COURT

North Gauteng High Court, Pretoria

BEFORE

T Brenner

CASE / FILE NUMBER

80706/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

Date of hearing: 10 May 2017

Date of judgment: 12 May 2017

In the matter between: Case

number 80706/2016

DREW VAN COLLER

Applicant

And

FIRSTSTRANDBANK LIMITED

Respondent

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

BRENNER, AJ:

1. This is an application for leave to appeal against the whole of my judgment dated 7 March 2017.
2. The grounds for appeal in the notice of application for leave to appeal are confined to findings which relate to the defence based on reckless lending within the purview of section 81(2) of the NCA.
3. The parties are cited as they are in my judgment.
4. Van Coller contends that I erred in:
 - a. Finding that his allegations that he provided no information on his financial history or participated in an assessment in terms of section 81(2) of the NCA and his failure to specify what information he did indeed provide did not suffice for proving a bona fide defence in the summary judgment application;
 - b. Taking judicial notice of standard commercial banking practice to draw the conclusion that an assessment must have been done;
 - c. Assuming that the execution of the written loan agreement with FRB constituted proof that an assessment was performed;
 - d. Finding that van Coller should have provided proof to FRB of his purchase of four properties on the same day, all of which were to be encumbered by mortgage bonds, when there was no legal duty to do so.
5. In determining whether summary judgment should be granted, I considered the allegations raised by van Coller to be bald, sketchy and inherently improbable.
6. His assertion that he provided no information on his financial history or participated in an assessment of his financial position was vague. This version was tantamount to his making an inherently improbable imputation that FRB made no effort to establish his ability to afford the mortgage bond instalments before granting the bond.
7. In the grounds for appeal, van Coller misconstrued the subject matter of what I considered to be standard banking practice. I did not deduce from my observation simpliciter that because banks would normally take steps to assess affordability, that an assessment under section 81(2) was indeed performed.
8. I refer to paragraph 32 of my judgment. It was the questionable deficiency in van Coller's version, taken conjunctively with the terms of the loan agreement signed by him, which made it more probable than not that an assessment as required by section 81(2) of the NCA was performed, and that section 81(4) precluded him from an actionable defence under section 81(2).

9. Weight was attached to van Coller's failure to furnish the Court with any detail of the nature and extent of his dealings with FRB before the bond was granted. There had to have been dealings and the provision of information of some nature pertaining to his affordability. Yet van Coller was patently clandestine about this issue.
10. Weight was attached to the terms of the loan agreement which van Coller did not dispute having read and understood and signed. The principle of caveat subscriptor applies here. Van Coller did not address this issue at all. In determining whether an issue fit for trial was raised, I could not disabuse my mind of the various warranties given by van Coller to FRB in the loan agreement.
11. On the version advanced by van Coller, there was a material fact, peculiarly within his personal knowledge, that he had exposed himself to substantial debt of R1 803 000,00 secured by four mortgage bonds for four separate properties. Only one of the loans was applied for and granted by FRB.
12. At his peril, van Coller refrained from taking the Court into his confidence by mentioning whether this significant fact, impacting on the affordability enquiry, was imparted to FRB. This occurred in the face of his assurance, at clause 5.11 of the loan agreement, that he had "disclosed to the Lender all relevant information relating to existing credit agreements, suretyships and current credit applications submitted to any other credit provider."
13. In his affidavit, van Coller states that he cannot pay all four mortgage bonds on a monthly income of R20 501,98 since the bonds and his expenses amount to about R28 760,00 per month. To establish a bona fide defence, van Coller should have addressed the issue of whether his exposure to four bonds was disclosed to FRB.
14. Based on the totality of the evidence germane to this defence, van Coller failed to advance a credible, genuine, bona fide defence to FRB's claims. I refer further to the reasoning in my comprehensive judgment on the subject.
15. Van Coller's grounds for leave to appeal would not have a reasonable prospect of success on appeal, and that there is no other compelling reason why an appeal against my judgment should be heard. This in terms of sections 17(1)(a)(i) and 17(1)(a)(ii), respectively, of the Superior Courts Act, 10 of 2013.
16. In my view, leave to appeal should therefore be refused, with costs following the result.
17. Costs may be awarded on the attorney and client scale in terms of clause 2.15.2 of the loan agreement.
18. The following order is granted:
 - a. The applicant's application for leave to appeal against the judgment dated 7 March 2017 is dismissed;

b. The applicant is directed to pay the costs of this application on the attorney and client scale.

T BRENNER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

12 May 2017

Appearances

Counsel for the Applicant: Advocate

A P Ellis

Instructed by: PDR

Attorneys

Counsel for the Respondent: Advocate

Schoeman

Instructed by: Strydom

& Bredenkamp Inc Attorneys

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