



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE:.....
.....

SIGNATURE:

Case number:
2010/24986

IN THE MATTER BETWEEN:

MICHAEL G

First Applicant

MICHAEL L.C

Second Applicant

and

FIRST RAND BANK LIMITED

Respondent

Judgment

BHOOLA AJ:

Introduction

[1] This is an application for leave to appeal against the whole of my judgment and order handed down on 28 January 2019. The applicants are the defendants in the main action and the appellants in the application for leave to appeal. They are referred to herein as “the applicants”. The respondent is the plaintiff in the main action.

[2] The cause of action arose in 2010. Default judgment was entered against the applicants on 21 June 2017. They launched an application for rescission on 22 August 2017. They now seek leave to appeal against my order and judgment of 28 January 2019 refusing to grant the rescission application. The applicants also seek condonation for the late filing of their notice of application for leave to appeal.

Application for condonation

[3] The application for leave to appeal is dated 18 February 2019 and was served on the respondent’s attorneys on 25 February 2019. However, it appears to have only been filed with the Registrar of civil appeals almost a year later, on 18 February 2020, in contravention of the requirements of paragraph 1 of Chapter 11 of this Court’s Practice Manual which states that: *“An application for leave to appeal must be filed with the registrar in charge of civil appeals. A copy of the application must also be filed with the Judge’s Secretary.”*

[4] The dates of filing appear on Caselines from the pleadings filed by the respondent from their files. The applicants denied that the notice of application for leave to appeal was filed more than a year late and contend that the application was served and filed a mere four days late. They were not able to prove that the application was filed timeously, and Mr Marks, applicants’ counsel, submitted that they were not able to respond timeously as this point had belatedly been taken in the respondent’s heads of argument in the application for leave to appeal. He submitted that the applicants do not have access to their files and were unable to produce evidence in substantiation of the submission that the application was only four days not

more than a year late. Mr Marks sought a postponement proposing that the respondent should file an explanatory affidavit setting out the facts on which they rely for this contention. This was not a formal application for a postponement and I refused counsel's request for a postponement. In any event it is the applicants as *dominus litis* who bear the duty to prove that they filed the application for leave to appeal timeously.

[5] The application for leave to appeal would thus appear to be out of time by more than a year, not only by four days as the applicants contend. The applicants allege that reason for the lateness of the application is due to the fact that they were "stretched in terms of funding". They were only able to place their attorneys in funds on or about 23 February 2019. However, they provide no explanation why, although the application for leave to appeal was served on 25 February 2019, it was only filed a year later on 18 February 2020; why they took no further steps to prosecute the appeal; and why the application for condonation was only served on 22 June 2021, a week before the application for leave to appeal was set down for hearing. All steps to prosecute the appeal, including enrolment of the appeal for hearing, were in fact taken by the respondent's attorneys. This is an indication of the dilatory manner with which the applicants have treated this matter, and it is of some concern that the cause of action arose in 2010. The Applicants' main submission was that that it would be a travesty of justice to refuse the condonation application and thus the appeal itself when the application was only a few short days late and to shut the door to the applicants in these circumstances.

[6] In the matter of *S v Yusuf*¹ the Appellate Division had regard to the requirement of good cause in relation to a request to be excused from non-compliance with the Rules of Court. It held as follows:

"Thus the Court has had regard to factors such as the efforts made towards compliance with the Rules, the degree of non-compliance (in this case the length of the delay), the explanation therefor, the prospects of success, and the importance of the case. Such factors are not individually decisive, but

¹ 1968 (2) SA 52 (A).

must be weighed one against another, for example a short delay and good prospects of success might compensate for a weak explanation. In each case the question is whether sufficient cause has been shown for the relief sought.”

[7] In order to succeed with an application for condonation, the applicants must therefore show good cause. This entails three elements. Firstly, they must give a reasonable explanation for their default. Secondly, they must show that the application is made *bona fide*. The third element is that the defendants must show that they have a *bona fide* defence, which *prima facie* carries some prospect of success.

[8] In assessing the reasonableness of the explanation for the default, this Court has to consider not only the lateness of the application for leave to appeal but also the delay in seeking condonation for such lateness. I agree with the submission by respondent’s counsel, Ms Denichaud, that there is no satisfactory explanation for either of the delays caused by the applicants. Indeed, there are no facts and/or reasons provided for the delay at all, and that the conduct of the applicants in the matter reflects their lack of *bona fides*.

[9] It is trite that when a litigant realizes that he has not complied with a Rule of Court, he should apply, without delay, for condonation. It was held as follows in the matter of *De Beer en ‘n Ander v Western Bank Ltd*²:

“Dit is reeds by herhaling in uitsprake van hierdie Hof gestel dat ‘n aansoek om kondonasië gedoen moet word so gou doenlik na ‘n betrokke party tot die besef kom dat hy nagelaat het om aan voorskrifte van die Appèlhofreëls te voldoen.”

[10] In relation to the third element, which is that the defendants must show that they have a *bona fide* defence, which *prima facie* carries some prospect of success, Ms Denichaud submitted that the application for condonation is not made *bona fide*, nor is there a *bona fide* defence. An application for condonation is not a mere formality. Counsel submitted that applicants also

² 1981 (4) SA 255 (A).

had an obligation, yet failed, to show that the grant of the indulgence sought will not prejudice the respondent in any way. She submitted that it is clear from the manner in which the applicants are litigating, and with specific reference to the background facts, that their conduct is prejudicial to the respondent in that unnecessary legal costs are being incurred as result of time and legal resources being wasted; and that the respondent is required to address bogus defences which are clearly untenable.

[11] Ms Denichaud submitted that the applicants have also failed to satisfy the elements required to prove good cause. Accordingly, she submitted that the application for condonation is lacking in material respects, is fatally defective and ought to be dismissed with costs on the attorney and client scale. In my view, if regard is had to the grounds of appeal, as embellished in the applicants' heads of argument, there is indeed no *bona fide* defence and hence no prospects of success in the appeal. I deal with this below.

Leave to appeal

[12] The following grounds of appeal, *inter alia*, were raised in the notice of application for leave to appeal :

12.1 The learned Judge erred in not finding that the applicants' claim has prescribed in terms of section 11 of the Prescription Act 68 of 1969. The respondent's amendment to the Declaration was only granted on 5 October 2016 and served on the first and second defendants on or about 18 November 2016.

The pleadings did not prior to that make out a sustainable action sufficient to found a proper action in law.

The cause of action as pleaded, is based on a transaction and facility agreement (loan agreement), and letters of demand, placing the debtor (Applicants) in mora, ostensibly sent on or about 19 or 23 March 2010 and or 16 June 2010 and a proper action was only before the court

(after the amendment) being on the 14 October 2016. Prior to that an expiable action had been instructed and no proper action was before the court and prescription was accordingly not interrupted by the issue of summons in 2011.

Accordingly, the respondent's claim has prescribed in terms of section 11 of the Prescription Act 68 of 1969.

12.2 The Court erred further in that it failed to consider the merits of the rescission application on affidavit:

12.3.1 The Court erred in upholding that the deponent to the application for summary judgement had authority to depose to the affidavit in support of the application for default judgement and that she had sufficient knowledge of the facts she verified on affidavit as no proof of authority (sic).

12.3 The learned Judge erred in finding categorically that there had been compliance with section 129 in the face of a material and substantial factual dispute and should have rescinded the judgment and order in compliance with section 129 by Plaintiff prior to the matter proceeding.

12.4 The Honourable Judge erred in finding that the institution of court process was not premature, and in breach of the provisions of section 129 of The National Credit Act.

12.5 The Honourable Judge erred in finding that the applicant had failed to discharge the onus of proving that it was entitled to an order granting the application for rescission of judgment, on a balance of probabilities.

12.6 Another court could have and should have come to a different conclusion and on a conspectus of the above grounds the application for leave to appeal should have been granted.

[13] In considering the prospects of success in the application for leave the

following submissions are relevant :

Prescription

13.1 Ms Denichaud submitted that this point had been abandoned by the applicants during the rescission application and it cannot be revived now. In any event, the point is legally and procedurally unsound in that even if the applicants submit, as they appear to do now, that the cause of action arose on 16 June 2010 but that a “proper action” was only proceeded with on 18 November 2016, when the respondent/plaintiff’s amendment was effected, the claim would not have prescribed. In this regard section 11(a)(i) of the Prescription Act provides that:

“The periods of prescription of debts shall be the following:

(a) thirty years in respect of-

(i) any debt secured by mortgage bond;”

13.2 The debt incurred by the applicants under the facility agreement was secured by two covering mortgage bonds, the first mortgage bond being registered on 22 October 2007 and the second mortgage bond being registered on 23 October 2007 (see annexures “B” and “C” to the declaration). Thus the applicable period of prescription is 30 years. I agree with Ms Denichaud that there is in the circumstances no merit to this ground of appeal.

Authority and section 129

13.3 These grounds of appeal are nonsensical. In his heads of argument, Mr Marks conceded that there is no issue of authority nor was there an application for summary judgment. Furthermore, section 129 is not at issue in this matter.

Calculation of the interest rate

13.4 Mr Marks submitted that the Court erred in that it failed to consider the merits of the rescission application in regard to the contradiction between the allegation on the interest rate and the contents of annexure CS11 as read with CS7. The Court failed to find that the allegations contained in the particulars of claim as well as the agreement attached thereto contradicted the

allegations as more fully detailed in annexure CS11 which states specifically “[a]s a token of goodwill we have reduced your interest rate by a further 50%” to the Application for Rescission of Judgement, which annexure is a letter dated 11 April 2008, from the Plaintiff to Defendants.

13.5 Mr Marks submitted, relying on *ABSA Bank Ltd v Havenga*,³ that this is a clear variation of the agreement, which it is trite was never applied by the respondent in calculating the debt and accordingly is not even alleged in the particulars of claim. Thus, the certificate of balance is incorrect and rescission should have been granted on this ground alone. Accordingly, the Court erred in finding that the terms as appearing on annexures CS7 (Case lines 01-22), i.e. the agreement relied upon by the respondent, were in fact terms agreed upon by the parties, which finding was material to the court granting the order against the applicants, as it is submitted that annexure CS11 was an agreed variation of the terms in regard to the interest rate. The Court erred further in finding that the interest rate claimed by the respondent was correct insofar as it is trite that the 50% reduction was not in fact applied. Accordingly, the applicants have alleged facts which would clearly constitute a reviewable irregularity, entitling them to an order setting aside the Default Judgement and having the matter referred to evidence, even if only on this narrow issue.

13.6 Ms Denichaud submitted in regard to the interest rate point that it was clear from the respondent’s answering affidavit that the interest rate was reduced by 0,5% or 50 basis points and that the reference to 50% in the letter (annexure CS11) was a typographical error. The applicants were aware of this and refer in their founding affidavit (Caselines 01-3-11) to a total -2% reduction that they are entitled to on the interest rate applicable. Annexure AA16 to the replying affidavit makes it clear that the respondent applied a rate of 14% less 2% and then a 0,5% further reduction. It had never been the applicants’ understanding that they would receive a 50% reduction and the respondent’s evidence clearly establishes this. In any event, counsel submitted, this point obscures the fact that the respondent is seeking a money

³ (21558-10) [2010] ZAGPPH 147 2010 (5) SA 533 (GNP) (10 August 2010).

judgment on the capital plus interest but the applicants have not made payment even of the capital amount in over ten years while they continue to occupy the property. I agree with Ms Denichaud that in addition that there would have been no basis for referral of this point to oral evidence as was submitted by Mr Marks, and that it this ground of appeal has no prospects of success.

Notice in terms of Section 86(10)

13.7 Mr Marks submitted that the Court erred in not finding that the Respondent had failed to comply with the provisions of Section 86 of the National Credit Act 34 of 2005 and that as a result the judgment had been granted in error. The Court erred in not finding that no proper notification was sent to each of the applicants in respect of the section 86 notice. The respondent relied upon annexure D1, D2 and D3 as evidence of compliance. (Caselines 09-85 to 09-86). D1 is addressed to both applicants, in a single document. D2 is a registered slip also addressed to both applicants. There is no evidence as to whether each applicant or either of them received notice, no printout from the post office, and even if there was compliance in that the post office sent a notification, at least one of the applicants would not have received notice as required by section 86. Thus, the submission is that there was no compliance with Section 86 *ab initio*.

13.8 On this basis alone the Court should have found on considering the papers in the rescission that an order rescinding the judgement should have been granted as there was no evidence before the Court when the order was granted of compliance with section 86 and the Default order had been improperly granted based on the error that there had been proper compliance with section 86. The non-compliance was a statutory breach, and no proper action was before the Court, which should have rescinded the judgment on this ground alone. By analogy, the Rules of Court and common law require that in any legal action each defendant is to be served with any court papers where they are cited as a defendant, separately, even if they happen to be spouses and even if they happen to use the same *domicilium* or residential

address, why then should a mandatory statutory notice be subject to a lesser requirement when same is mandatory under legislation.

13.9 Mr Marks submitted that the Court erred in not finding that there had been noncompliance with section 86 in the face of a material and substantial factual dispute and should have rescinded the judgment and either dismissed the action in toto or alternatively exercised its discretion and ordered compliance with section 86 by the respondent prior to the matter proceeding. He submitted that although *Sebola*⁴ deals with Notices under Section 129, the principles of service and delivery are directly analogous and on point as regard section 86 Notices.

13.10 Mr Marks submitted that in *Standard Bank of South Africa Ltd v Visagie and Another*⁵ Kruger J refused summary judgment as there was no proof that the 86(10) notice had in fact been delivered to the post office where the defendant resided. The pleadings that are before this Court likewise have no proof of delivery to the post office where it was ostensibly sent. By extension of this principle, the failure to send a notice to each defendant and the lack of proof of actual delivery to the post office where the defendant(s) reside is irregular and is grounds to set aside the default order and the Court should have granted the order for rescission on this ground alone and accordingly the applicants submitted that the appeal should be granted on this ground.

13.11 Accordingly, the Court erred in finding that the institution of court process was not premature, and in breach of the provisions of section 86 of the National Credit Act in that factually one of the defendants had never been served with a notice, nor was one despatched to at least one of or perhaps even both defendants. The consequence of not having been provided with a section 86(10) notice is that no proper action commenced or served before the Court when the order was granted.

⁴ *Sebola and Another v Standard Bank of South Africa Ltd and Another* (CCT 98/11) [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (7 June 2012).

⁵ [2015] ZAFSHC 117 (25 June 2015).

13.12 In regard to the section 86(10) notice, Ms Denichaud submitted, correctly in my view, that the applicants are amplifying their grounds of appeal in their heads of argument by raising for the first time that although the reference to section 129 in their application for leave to appeal was an error, that the law relating to section 129 notices is nevertheless applicable. The applicants at no stage disputed receipt of the section 86(10) notices, and it cannot behove them to raise this on appeal, and in their heads of argument, for the first time. Moreover, at the time default judgment was granted, *Sebola* was not applicable. I agree with Ms Denichaud that this ground of appeal is similarly without merit.

The Default Judgment (Second Application)

13.13 This ground of appeal is that the respondent ostensibly served a second application for Default Judgement, simultaneously with a notice that purported to withdraw the first application. The purported notice of withdrawal is irregular, alternatively defective as same clearly fails to make any tender of costs, as required by the Practice Directive and the Rules of this court. This ground of appeal is raised for the first time in heads of argument and can in my view be disposed of on this basis alone.

[14] On the above grounds, Mr Marks submitted that another court could have and would have come to a different conclusion and on a conspectus of the above grounds the application for leave to appeal should succeed. Ms Denichaud submitted that the application for rescission was correctly dismissed and there is no prospect that another court would come to a different conclusion on appeal. I agree. Hence, in my view the application for leave to appeal lacks a *bona fide* defence and has no prospects of success.

[15] In conclusion, the application for condonation falls short of the legal requirements pertaining to Uniform Rule 27 applications. The applicants clearly dragged their feet in their compliance with the Rules of this Court and have not provided good cause for the delays occasioned by their failure to prosecute this appeal. They have in my view failed to show good and

sufficient cause to entitle them to condonation in this instance. They have furthermore failed to show that there are any prospects of success in the appeal.

Order

[16] In the result, I make the following order:

1. The condonation application is dismissed.
2. The First and Second Applicants shall pay the costs of the condonation application on the scale as between attorney and client.
3. The application for leave to appeal is dismissed.
4. The First and Second Applicants shall pay the costs of the application for leave to appeal on the scale as between attorney and client.

U. BHOOLA

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Date of hearing: 2 July 2021. Heard by videoconference as per the Consolidated Directive of the Judge President of 11 May 2020 as extended.

Date of judgment: 14 July 2021.

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