



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

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

9 MAY 2022

Date

Judge M.L. Senyatsi

Case no: 25426/21

In the matter between:

GUMEDE

Applicant

and

ABSA BANK LIMITED

Respondent

Case Summary: APPLICATION FOR LEAVE TO APPEAL JUDGMENT - WHETHER THERE ARE SUFFICIENT FACTS PROVIDED FOR THE INVOCATION OF SECTION 85 OF THE NATIONAL CREDIT ACT 35 OF 2005

LEAVE TO APPEAL JUDGMENT

SENYATSI J

[1] This application is for leave to appeal the judgment granted in favour of ABSA on 24 November 2021, for the return of three luxurious motor vehicles by Mr. Gumede, the applicant in this leave to appeal, to ABSA due to failure to honour monthly repayments obligations.

[2] Ms. Marks counsel for the Applicant stated in her opening submission, that the Applicant understands the basis of the court finding against him but maintained that there were compelling reasons for the application for leave to appeal to be favourably considered.

[3] The reasons are the circumstance under which a debtor may be declared over-indebted or referred restructured. It was submitted on behalf of the Applicant that the issue that required to be determined by the Supreme Court of Appeal affects the public and went beyond the parties involved in the matter.

[4] In this leave to appeal application, the Applicant relies on the provisions of section 17(1)(9)(ii) of the Superior Courts Act (“the Act”) no 10 of 2013 which provides as follows:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a)(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”

[5] It is apparent from the reading of the section relied on by the Applicant that the court may favourably consider leave to appeal if there are compelling reasons to grant such leave. In particular, the conflicting judgments may be one such other compelling reason to grant such leave. The Applicant bears the onus on showing conflicting judgments on the issue at hand.

[6] In his leave to appeal, the Applicant contends that he was over-indebted that court ought to have referred the dispute to the debt counsellor. I have dealt with reasons why this could not be done in the reasons for the judgment and will not repeat them in this judgment. It should be remembered that “over-indebtedness is not a defense on the merits.”¹ It is only in cases where the debtor is able to show that the credit provider refused to participate in the debt review process in good faith that the court can exercise its discretion in favour of granting the consumer on opportunity to have his debt reviewed.

¹ See *Seyffert & Another v First Rand Bank Ltd 2012(6) SA 581(SCA)*

[7] As stated in my judgment this was not the case. In fact, the applicant had been offered an option to have the debt referred to a debt counsellor. He did not take that opportunity and failed to explain to the court at the hearing of the application for termination of the installment sale agreements for all the cars the reasons for his failure.

[8] The court was asked to favourably consider leave to appeal given the conflicting decisions in *First Rand Bank v Olivier*²(2. 2009(3) SA 353(SE) and *Standard Bank of SA Ltd v Panayiotts*³

[9] In *First Bank Ltd v Olivier* ⁴ the consumer had been given an option to refer the debt for review by the debt counsellor and failed to take that option. The court in that case laid down the approach that court should take to exercise a discretion in favour of the consumer. One of the requirements was that the consumer should explain why the option was not taken. It should be remembered that in that case the consumer admitted having received the notice in terms of section 129 of the Consumer Credit Act (“the CAA”).

[10] The facts in *Standard Bank of SA Ltd v Panayiotts*⁵ are distinguishable. The notice was sent in terms of section 129 of the CAA but was not received by the consumer. At the hearing of the application the consumer applied to have a debt review and asked for condonation of the late application for the debt review on the ground that the section 129 notice did not reach him. The court, correctly in my view, exercised the discretion in his favour and granted him the application to have the debt reviewed. However, after assessing the consumer’s financial affairs, the court still went on and granted judgment in favour of the credit provider.

[11] If regard is had to the facts of the two cases referred to, which facts are clearly distinguishable, there is no doubt that the cases are not conflicting with each other.

[12] Having considered the basis upon which this leave for leave to appeal, this court is not persuaded that another court will come to a different conclusion. It follows therefore that leave to appeal the judgment must fail.

² 2009 (3) SA 353 (SE)

³ (08/00146) [2009] ZAGPHC 22 (6 February 2009)

⁴ Supra

⁵ Supra

ORDER

[13] The following order is made:

(a) The application for leave to appeal is refused with costs.

**M.L. SENYATSI
JUDGE OF THE HIGH COURT**

Heard: 7 April 2022
Judgment: 9 May 2022
Counsel for the Applicant: Adv N. Alli
Instructed by: Jay Mothobi Inc.
Counsel for the Respondent: J. S. Marks (Attorney with rights of appearance)
Instructed by: June Stacey Marks Attorneys