REPUBLIC OF SOUTH AFRICA

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

Case Number: 7960/2021

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

18 August 2023 _____
DATE SIGNATURE

In the matter between:

ASSETLINE SOUTH AFRICA (PTY) LTD Applicant

and

MLM AND ASSOCIATES INC First Respondent

ROSE MOSIMA LESHIKA Second Respondent

JUDGMENT

Mia J

[1] The applicant applies for leave to appeal to the Full Bench of the Gauteng Division of the High Court of South Africa, against the judgment and order of this court granted on 4 July 2023.

[2] The grounds upon which the applicant appeals against the above judgment and order are as follows:

"1. The learned Judge dismissed the applicant's application on the basis that the "second agreement" concluded between the parties was void because i) the applicant did not perform an affordability assessment in relation to the second agreement, and ii) the second agreement was reckless.

2. In making such a finding, the learned judge held that the second agreement was regulated by provisions of the National Credit Act.

3. The learned judge erred in fact and/or in law in finding that the second agreement was regulated by the National Credit Act. In this regard:-

3.1 the first respondent is a juristic person.

3.2 the according to the first respondent, its asset value or annual turnover was at the time of the second agreement, below R1,000,000 -being the threshold determined by the minister in terms of Section 7(1) of the National Credit Act.

3.4 In terms of section 4(1)(1)(a)(b) of the National Credit Act, the national Credit Act does not apply to large agreements in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement was made, below R1,000,000.

4. The learned Judge ought to have found that the Second agreement was not regulated by the provisions of the national Credit Act and was specifically excluded by section 4 (1)(b) of the National Credit Act.

5. Had the learned Judge held that the second agreement was not regulated by the provisions of the National Credit Act, it would have axiomatically followed that:-

5.1 The applicant was not obliged to perform an affordability assessment prior to concluding the second agreement; and

5.2 The provisions relating to reckless credit in the National Credit Act did not find application.

6. The learned judge erred in law and/ or in fact in holding that The second respondent was the alter ego of the first respondent.

7. The learned judge thus erred in fact and/or in law in finding that the second agreement was void.

8. The learned judge earth in law and/ or in fact in finding that reserve price had to be determined for the immovable property. The immovable property in question is not a residential property(it is a commercial property out of which the first respondent operates its practice), and accordingly the provisions of rule 46A(including those dealing with reserve prices) do not find application.

9. The learned judge ought to have held that it was not necessary to set a reserve price for the sale of the property.

10. The learned judge erred in law and oh in fact in malting the applicant with attorney and client costs. Having found that the second agreement was void, there was no basis upon which the learned judge could find *"the agreement makes provision for the costs on the attorney and client scale.*" Furthermore, the second agreement does not provide for any basis for the respondents to be entitled to attorney and client costs.

11. The learned judge add in law and or in fact in dismissing the applicants application, the learned judge ought to have upheld

the application and granted relief in the manner set out in the notice of motion."

[3] The grounds on which an applicant may seek leave appeal are set out in section 17(1) on the Superior Courts Act 10 of 2013 (the Superior Courts Act), which provides:

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
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> *(a)* (i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
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> *(b)* the decision sought on appeal does not fall within the ambit of section 16 (2) *(a)*; and
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> *(c)* where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[4] The applicant appreciates that the test does carry an onus that there should be a reasonable prospect of success. On the applicant's admission, referring to the decision in *S v Smith*[1] " *There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal"*

[5] On this basis, it was argued on behalf of the applicant that there are prospects of success on appeal. Counsel for the applicant submitted the appeal was premised primarily on one ground, that the National Credit Act 34 of 2005(NCA), did not apply to the "second agreement" that was concluded between the applicant and the first respondent for which the second respondent stood surety. Counsel continued that the court found correctly that the second agreement superseded and replaced the first agreement that was concluded between the first respondent and the applicant. However, it was argued that the court erred in finding that the second agreement was regulated

[1] *S v Smith* 2012 (1) SACR 567 (SCA) at para 7

by the provisions of the NCA. This was so in that the court found that the applicant failed to conduct an affordability assessment alternatively, the applicant was precluded from charging an initiation fee or that the agreement contains a usurious interest rate. It was submitted that the finding was factually and legally incorrect.

[6] Counsel submitted that the second agreement in which the first respondent is a juristic person and the amount advanced to the first respondent falls above the threshold established in terms of the NCA, namely R250,000, thus it followed that the NCA did not apply to the second agreement as is evident in section 4 (1) of the Consumer Protection Act 68 of 2008. The applicant placed reliance on the common cause facts that the provisions of the NCA do not find application to the second agreement. It followed so counsel argued that the provisions regarding reckless credit, including the affordability assessment we're not applicable and the finding by the court that the agreement was void was incorrect.

[7] The applicant submitted further that the finding that the NCA was applicable by virtue of the first respondent being the alter ego of the second respondent was not supported by allegations in the affidavits. In the event that this was so, it did not warrant the court disregarding the separate legal personality of the first respondent. This necessitated the court having to pierce the first respondent's corporate veil and finding that the second respondent utilised the first respondent fraudulently and dishonestly, which was not the basis for the courts finding in which the court did not find. Accordingly, it was submitted that even if the first respondent was the second respondent's alter ego the court erred in concluding that the provisions of the NCA applied to an agreement between the applicant and the first respondent. Thus counsel concluded, the provisions of the NCA do not apply to the second agreement. The applicant was not obliged to perform any affordability assessment prior to concluding the second agreement. The second agreement is not void and is valid and binding on parties and the respondents are indebted to the applicant in the amount set out in the notice of motion.

[8] Counsel for the respondent submitted as a point of departure that the first agreement was unlawful and void and therefore the second agreement is void. Counsel continued that no affordability assessment was conducted in respect of the first agreement. In this regard, it was contended that the respondent had two judgements against her name and there was no basis on which credit could realistically and reliably have been provided. It was submitted that the applicant at that entered into the agreement in a reckless manner.

[9] On this basis it was submitted connect with the agreement had been novated and the second agreement suffered the same defect as the first agreement which was unlawful and void, and therefore the court was correct in not giving effect thereto. Counsel continued that an appeal court would reach the same conclusion in this regard and relied on the decision in *Gibson v Van de Walt*[2], where the facts which related to a fresh agreement to pay an older betting debt which was unenforceable. In *Gibson* the application was dismissed.

[10] Counsel for the respondent also referred to the decision in *Acacia Mines Ltd v Boshoff*[3] , where the parties entered into a second contract owing to an error in the first contract. The court in *Acacia* found that by entering into the second contract, the first contract was repudiated and was no longer operative or enforceable. Counsel therefore argued that the conclusion reached is that the application is to be dismissed. The third ground of appeal it was submitted is relevant to the appeal court and the fourth issue related to the cost issue. The first respondent's counsel submitted that the application be dismissed with costs.

[11] From the submissions, it did not appear that counsel for the respondent disputed the submissions made on behalf of the applicant, namely that the second agreement was not regulated by the NCA. Counsel for the respondent's submissions focused on the first agreement being regulated by the NCA and the affordability assessment. To the extent that there was an error on this aspect the applicant is entitled to have the matter considered on appeal. In view of the findings that have been made there's a reasonable possibility that

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[2] *Gibson v Van De Walt* 1952(1) SA 262 A
[3] *Acacia Mines v Boshoff* 1958 (4) SA 330

another court could come to a different decision. It follows that leave to appeal ought to be granted as requested to a Full Court of this Division.

[12] Consequently I grant the following order:

1. The applicant is granted leave to appeal against the judgment and order of this Court dated 4 July 2023 to the Full Court of this division.

2. Cost to be costs in the appeal.

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JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant:	Adv. J Hoffman Instructed by SWVG Inc
For the Respondent:	Adv. S Mathiba Instructed by Preshnee Govender Attorneys
	Heard: 17 August 2023
	Delivered: 18 August 2023