IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 32613/2020

DELETE WHICHEVER IS NOT APPLICABLE

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

25 March 2024
DATE

SIGNATURE

Heard on: 7 March 2024
Delivered on: 25 March 2024

In the matter between:

STRANGER ZIKIE MOLUSI 1st Applicant

DEDREA CARMEN YVONNE MOLUSI 2nd Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

In re

THE STANDARD BANK OF SOUTH AFRICA LIMITED. Plaintiff

and

STRANGER ZIKIE MOLUSI	1st Defendant
DEDREA CARMEN YVONNE MOLUSI	2nd Defendant

JUDGMENT

VUMA, AJ

[1] In Stranger Zikie Molusi and Dedrea Carmen Yvonne Molusi ("the applicants")'s Notice of application for leave to appeal dated 26 August 2021, leave to appeal to the Supreme Court of Appeal, alternatively, to the full bench of the North Gauteng Division of the High Court of South Africa, Pretoria, is sought against the whole of the judgment (including the order as to costs) in the above matter, delivered by me *ex tempore* on 4 August 2021., on The applicants appeal against the findings of fact and law in my *ex tempore* judgment on the grounds that I erred and misdirected myself in the respects as appear below-herein.

[2] The applicants contend that the appeal would have a reasonable prospect of success as contemplated by section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 ("the SCA Act"). The applicant further contends that there are other compelling reasons why the appeal should be heard as contemplated by section 17(1)(a)(ii) of the Act.

[3] It is trite that an application for leave to appeal a decision from a single Judge of the High Court is regulated by Rule 49 of the Uniform Rules of Court. The substantive law

pertaining to application for leave to appeal is dealt with in section 17 of the Superior Courts Act 10 of 2013.

[4] The applicants' grounds of appeal are found in their Notice of Application for Leave to Appeal.

THE APPLICANTS' CASE

[5] The applicants stated the following as the **Errors of fact** committed by the Court:

5.1. The Court erred in finding that the respondent did not know where the applicants resided.

5.2. The Court failed to give sufficient weight to the fact the respondent knew where the applicants lived because the respondent served its application for default judgment at the applicant's primary residence.

5.3. The Court failed to attach sufficient weight to the fact that the first applicant's income stream was cut off as a result of the lockdown restrictions enacted as a result of the Covid-19 Coronavirus pandemic in terms of the Disaster Management Act (No. 57 of 2002), which pandemic is an act of God beyond control of the applicants.

5.4. The Court erred in finding that the applicants were remiss in not taking advantage of the consumer protection mechanism in the national Credit Act by virtue of their failure to respond to the section 129 notice.

5.5. The Court ought to have found that if the applicants had received the section 129 notice they would have responded to the notice and also, in the context

of this case, would have been able to agree on a plan to bring the payments under the mortgage agreement up to date.

5.5.1. In this regard the Court to attach sufficient weight to the sale of the applicants' property in Kimberley the proceeds of which were paid to the respondent.

5.5.2. Furthermore, the Court ought to have found that the process of the settlement would have been more effective and fair had it occurred before litigation commenced, and that the applicants were prejudiced by the lack of notice.

5.6. The Court erred in finding that no settlement had been concluded and ought to have found instead that the settlement and compliance therewith were triable issues which could not be decided on affidavit.

5.6.1. Further to these grounds of appeal, the Court failed to take into account that the applicants paid the respondent R325 000-00 (three hundred and twenty-five thousand rand) which amount the respondent had accepted pursuant to the settlement; and

5.6.2. The Court failed to take into account that the respondent's complaint about the settlement was that the applicants had not complied with the terms of the settlement which complainant concedes the existence of a settlement.

[6] The applicants stated the following as the **Misdirection** made by the Court:

6.1. The Court failed to attach sufficient weight to the purpose of the National Credit Act section 129 notice and that to have any practical effect, the notice must be served personally.

6.2. The Court failed to address four key elements of the applicants' defence:

6.2.1. First, the respondent's contractual requirement that the applicants reside in the mortgage property;

6.2.2 Second, the increasing importance in our law to adopt a meaningful and purposive approach to the requirement of notice and other constitutional law protection of debtors residing in their primary residences;

6.2.3. Third, the problem of the respondent forum shopping to avoid rendering an effective section 129 notice by serving on the *domicilium* instead of the mortgage property primary residence);

6.2.4. Fourth, the Court failed to accept that the outstanding balance of the debt owed on the mortgage bond and the arrears were disproportionately low in relation to the substantial amount the applicants had already paid. This factor alone is a substantive ground of appeal.

6.3. The Court failed to consider that there is a conflict of procedures concerning execution against the primary residence of a debtor, and, that this conflict extends to other jurisdictions of the High Court of South Africa.

6.4 The Court erred by failing to rule that the applicants had disclosed a bona fide defence and had established a right to a trial. The Court ought to have declined the respondent's application for summary judgment and granted the applicants leave to defend the action.

6.5. Of equal importance to the grounds already raised by the applicants as stated above is their proposed further amendment dated 24 February 2024 to the existent leave to appeal application. In their said proposed further amendment, which argument they mounted during the application hearing, the applicants allege that the summary judgment ought not to have been granted in that the respondent failed to comply with the requirement that it must ensure that the registered letter reached the correct branch of the Post Office (the local Post Office branch of the applicants being Randburg at the relevant time) for collection by the applicants. Instead, the respondent sent the section 129 notice registered mail to an incorrect branch, namely, Hatfield branch, Pretoria.

[7] The applicants further submitted that, having regard to the existence of conflicting decisions and approaches to the constitutional safeguards concerning the primary residence of debtors in different divisions of the High Court of South Africa, that it will be

in the interests of justice and uniformity to allow an appeal to the Supreme Court of Appeal, alternatively, to the full bench of the North Gauteng High Court Division, Pretoria. However, during arguments, they submitted that there no need to allow an appeal to the Supreme Court of Appeal.

THE RESPONDENT'S CASE

[8] The Notice of intention to oppose dated 8 September 2021 was filed by the respondent. In its submissions, the respondent raised, *inter alia*, the following as its grounds for opposing the application for leave to appeal:

8.1 The applicants do not seek to overturn the decision on the basis that either it was wrong on the facts or on the application of the law, but solely on the grounds of the weight to be attached to the interest of the parties.

8.2. The applicants fail to identify, in any manner, the principle or fact upon which it is contended that this Court erred. Rather, they have presented a series of conclusions which do not assist this Court in determining their case. No case for the manner in which these errors affected the conclusion and order is articulated.

[9] In regard to the applicants' proposed further amendment as stated above regarding the respondent's failure to send the section 129 notice registered mail to the correct Post Office branch, the respondent argued that this was the first time of the applicants raising the incorrect post office. The Respondent further submitted that until now the applicants'

ground of defence was always predicated on either the respondent having delivered the section 129 notice at their previous *domicilium* and not at their “new” primary residence as per the mortgage bond. The respondent argued that the facts now being relied on and advanced fall outside the ambit of the impugned judgment and order.

[10] The respondent further submitted that there are no reasonable prospects of success that another court would come to a different conclusion and that the application for leave to appeal thus falls to be dismissed with costs.

[11] The principles governing the question whether leave to appeal should be granted are well established in our law. Such principles have their origin in the common law and they entail a determination as to whether reasonable prospects of success exist that another court, considering the same facts and the law, may arrive to a different conclusion to that of the court whose judgment is being impugned. The principles now find expression in section 17 of the Superior Court Act 10 of 2013

[12] It has also been generally accepted that the use of the word "would" in section 17 of the Act added a further consideration that the bar for the test has been raised with regard to the merits of the proposed leave to appeal before relief can be granted. The Act widened the scope in which leave to appeal may be granted to include a determination of whether "there is some compelling reason why the appeal should be heard."

[13] Having considered both parties' arguments; the impugned judgment and its order; including the proposed further amendments, I am satisfied that the applicants have not succeeded to make out a case for leave to appeal.

[14] In the premises I make the following order:

ORDER:

1. Leave to appeal is dismissed with costs.

Livhuwani Vuma
Acting Judge
Gauteng Division, Pretoria

ALA Heard on: 7 March 2024
ALA Judgment handed down on: 25 March 2024

Appearances

For Applicants: Adv. W.B. Boonzaier
Instructed by: O' Donavan Attorney

For Respondent: Adv. J.A. Du Plessis
Instructed by: Vezi & De Beer Attorneys