IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

Case No.: 2344/2013

Date Heard: 31 March 2017

Date Delivered: 11 May 2017

In the matter between:

ADELLE YVETTE POTGIETER Applicant/Defendant

and

ABSA BANK LIMITED Respondent/Plaintiff

JUDGMENT
(APPLICATION FOR LEAVE TO APPEAL)

EKSTEEN J:

[1] The applicant seeks leave to appeal against the judgment which I prepared and which was delivered on 31 January 2017. The applicant was the defendant in the action and the respondent the plaintiff. I shall refer to the parties herein as applicant and respondent respectively. The test to be applied at this stage in the proceedings is whether there is a reasonable prospect that another court would come to a different conclusion to that which I arrived at.

[2] The first three grounds of appeal relate not to the merits of the judgment, but to the fairness of the procedure. They have not been addressed in the judgment and I shall accordingly deal in greater detail with these grounds. They record as follows:

"1. The Court has erred and misdirected itself in not assisting the Applicant to obtain *in pauperis* assistance at the onset of trial. When liabilities exceed assets a person is bankrupt and in the light thereof the Applicant qualifies for *in pauperis* assistance.
2. The Applicant was severely prejudiced during trial not having legal representation and does neither know the Court Rules nor the Rules of Evidence.
3. The Applicant was denied justice by lacking the necessary legal representation." (*Sic)*

[3] A few preliminary remarks are appropriate. It is recorded at the outset that at no stage during the proceedings did the applicant refer to an application for assistance *in forma pauperis* nor was it ever alleged in the proceedings that the applicant's liabilities exceed her assets. In the event that such an averment had been made at the onset of the trial the respondent may well have chosen to proceed with sequestration proceedings rather than to be embroiled in trial proceedings. At the onset of trial, and, subject to what is set out below, at all times during the trial the applicant had an attorney of record duly mandated to take care of her interests.

[4] It is, of course, undoubtedly so that any litigant who is compelled to litigate in person against an opponent who is legally represented will inevitably be at a disadvantage. In an ideal world all litigants should enjoy equal representation. Sadly that it not always possible. It does not follow, however, that a litigant who is compelled by circumstances beyond his or her control to litigate in person is thereby denied justice. In the present instance, as will appear below, the applicant did have an attorney of record and later took a conscious decision to proceed without legal representation at the hearing.

[5] I turn to consider first representation *in forma pauperis.* Pauper proceedings provide for assistance only to the most severely impoverished persons in our society. Applications for leave to litigate as a pauper are governed by the provisions of rule 40 of the Uniform Rules of Court. Rule 40(1)(a) requires of a person seeking to institute proceedings or to defend proceedings *in forma pauperis* to apply to the registrar at the commencement of the process. In lodging such an application an applicant is required to satisfy the registrar that, excepting household goods, wearing apparel and tools of trade, he/she is not possessed of property to the amount of R10 000 and will not be able within a reasonable time to provide such a sum from his earnings (see rule 40(2)(a) as read with rule 40(1)(a)). I have perused the file in this matter which contains no reference to any application made to the registrar at the commencement of the process, nor at the onset of the trial.

[6] I am not persuaded that the interpretation which the applicant ascribes to the rule in the first ground of appeal is correct. (Compare ***Van Zyl and Another v Commercial Union Insurance Co. of SA Ltd*** 1971 (3) SA 480 (E) at 482B-C.) It is, however, not necessary for me to decide the issue herein. For purposes of the present application I shall accept, without deciding same, that the test envisaged in rule 40 is met by an averment of factual insolvency. The present litigation relates to a debt incurred by way of loan and secured by a mortgage bond over immovable property. The applicant is the registered owner of the immovable property. A bond in the amount of R490 000 to secure the loan was registered over the smallholding which was purchased for an amount of R895 000. The applicant was accordingly, *prima facie,* and in the absence of evidence to the contrary, possessed of equity in the property in an amount of more than R400 000. The applicant was therefore

clearly possessed of far greater assets than that required in rule 40 at the commencement of the process. For this reason the applicant did not remotely qualify to litigate as a pauper and an application to litigate *in forma pauperis* could not have succeeded at the commencement of proceedings. The applicant stopped all payments on the bond in 2013. At the onset of the trial the outstanding debt on the loan had increased to R770 057 which, *prima facie,* still left the applicant possessed of equity in the property in an amount of more than R100 000. Accordingly she did not qualify for assistance *in forma pauperis* when the trial commenced.

[7] It has, however, been held that where the financial position of a litigant deteriorates during the course of litigation an application may be brought to continue litigation *in forma pauperis*. Rule 40 does not provide the procedure to be followed in such an event and a procedure has accordingly been laid down in the Eastern Cape Division. Where an applicant seeks leave during the course of litigation to continue partly heard proceedings *in forma pauperis* the applicant should apply to the registrar, in accordance with the provisions of rule 40. In such circumstances, however, the affidavit which is to be delivered on behalf of the applicant must not only set out the circumstances required in rule 40(2)(a) but must further set out the alteration in circumstances that now renders it necessary to seek leave to pursue the action or defence *in forma pauperis*. No such affidavit was contained in the file at the conclusion of the trial. Such a litigant must, at the same time, give notice of the application to the opposite party and supply the opposing party with copies of the affidavit, statement and certificate to which rule 40 refers and require notification by the opposing party in writing to the registrar within fourteen days whether he/she

consents or objects to the application. In the event that that opposing party objects the applicant must apply formally to court for leave to continue *in forma pauperis* after giving notice to the other side. (See ***Commercial Union Assurance Company of SA Limited v Van Zyl and Another*** 1971 (1) SA 100 (E).) No such application was ever made; the respondent's counsel did not at any stage indicate receipt of such an application; no advocate or attorney, save as set out later herein, has given notice of an appointment to act *in forma pauperis* nor has the registrar given any indication of such an appointment or approach. In fact *ex facie* the record, the applicant was at all times represented by an attorney of record of her own choice.

[8] In respect of the engagement of counsel regard should be had to the factual history of the trial which commenced on 29 July 2015. At the trial the respondent tendered its evidence and closed its case. At that stage, the applicant sought a postponement to obtain counsel to present her case in the trial. I shall revert to this matter later. Suffice it at this stage to record that the postponement was granted for this purpose. The trial was re-enrolled for 7 November 2016. She again appeared in person and she again requested a postponement in order to secure the services of counsel. The respondent, as it was entitled to do, insisted that the application for postponement be made on oath. For this purpose the matter was adjourned to the following morning. An affidavit was prepared and filed together with a notice of filing, again in the name of her attorney in Durban. On 8 November, however, the applicant announced that she did not wish to proceed with her application for a postponement. I shall revert to these events too later herein. For present purposes it is necessary only to record that the application for postponement never served

before the court and the content of the supporting affidavits were not placed before court, nor referred to, nor brought to the attention of the court.

[9] At the application for leave to appeal Mr **Beyleveld** referred me to the affidavit delivered for purposes of the said application. In her affidavit in the intended application, which does not form part of the record, it now transpires that she alleged:

> "I was assisted by the Registrar of the Court on Thursday to access legal assistance. I believe I do qualify for in pauperis aid as worth is calculated as assets minus liabilities and thus at present I cannot afford to pay for legal assistance and qualify for legal aid. Coming on board now means legal representative has not had a chance to familiarise themselves with the case. It would disadvantage me to proceed without Counsel." (*Sic)*

This is the only reference to proceeding *in forma pauperis,* and as set out earlier it was never raised with the court.

[10] At the application for leave to appeal, after the conclusion of the trial, the applicant indicated a desire to make application for *in forma pauperis* representation and filed an application for postponement of this application. For this purpose the matter stood down to enable her to approach the registrar. The registrar acceded to her request and the application for leave to appeal was accordingly postponed. In due course counsel appointed to attend to the matter filed a notice recording that he had perused the record and was unable to certify *probabilis causa*. The application for representation accordingly failed.

[11] I turn to the second and third grounds of appeal recorded earlier. I have alluded in my judgment in the trial and earlier herein to the fact that the applicant was at all times assisted by an attorney, one Brent Pienaar, of M B Pedersen and Associates in Durban as her attorney of record. Prior to the commencement of trial his local correspondent withdrew. It has been placed on record that a written agreement was entered into between the parties that all pleadings and documents would thereafter be delivered to Attorney Pienaar in Durban. This was duly done and, subject to what is set out below, he remained on record throughout. On the day preceding the commencement of the trial an amended plea filed under the name of applicant's attorney was delivered. The applicant recorded that she had signed the amended plea "on behalf of (her) attorney". At the conclusion of the plaintiff's case the applicant sought a brief adjournment to consult telephonically with her attorney. This was granted and in consequence thereof she moved for a postponement of the trial in order to secure the services of counsel, which was similarly granted. During the resumed hearing a further special plea was filed, which I have referred to in my judgment. It too was filed under the name of the applicant's Durban attorneys and signed by the applicant on behalf of her attorney. It was thus apparent, as evidenced by the record, that throughout the proceedings, although the applicant appeared in person, she was assisted by an attorney of record duly mandated.

[12] In respect of her representation in Court it should be recorded that at the commencement of the trial the applicant intimated that there had been a "mix up with the proceedings" and she was not able to find an advocate to appear on her behalf at short notice. There was no suggestion at this stage that the failure of her advocate reflected on the pleadings and her attorney to attend sprang from an

inability to fund legal representation. She did not seek a postponement at that stage. At the closure of the plaintiff's case, however, as alluded to above, she sought a postponement of the trial after consultation with her attorney of record in order to obtain the services of counsel in the hearing. For this purpose, as recorded above, the postponement was granted.

[13] The events at the resumed hearing are set out earlier. On this occasion she intimated that she had received short notice of the re-enrolment of the matter and had been advised shortly before the commencement of trial that her Durban advocate and attorney would be unable to attend. She had then sought legal aid, but without success. Finally, she approached local attorneys and advocates but they would not accept her instructions. Ultimately she approached the registrar who, she says, appointed attorneys Cuban Chetty to represent her. The basis for her approach to the registrar was not disclosed. Cuban Chetty did not appear. It emerges from applicant's application for a postponement of the application for leave to appeal, to which I have alluded earlier, that Cuban Chetty Attorneys withdrew because applicant already had an attorney of record. The application for representation *in forma pauperis* did not proceed in the circumstances. At the time counsel, Ms Gagiano, approached me in chambers to advise that a member of the Bar Counsel had requested her to assist, but that she had no knowledge of the matter. She was unable to advise whether she had been appointed and if so on what basis. After further enquiry from the Bar Counsel she reverted to advise that she held no appointment or brief to appear. She was accordingly excused. Applicant again indicated her discomfort with proceeding personally and as set out above, sought a postponement from the Bar in order to obtain representation. The

respondent's insistence that it be on oath is set out earlier. To this end the matter was adjourned until the following morning. An affidavit was prepared and filed and, it transpires from a perusal of the file that it was again delivered under the name of her attorney of record. At the resumption the following morning, however, the applicant advised:

> "I have spoken to plaintiff's counsel and I feel that the application for postponement should be withdrawn and that we proceed without the call for legal assistance."

[14] The matter accordingly proceeded, at the election of the applicant, without legal representation.

[15] In the circumstances, although the applicant conducted the proceedings in person, she was at all times represented, *ex facie* the record, by an attorney of record who, *prima facie,* assisted her with legal advice during the course of the trial. As recorded in my judgment she acquitted herself admirably in the conduct of the trial and, in the final analysis, having been afforded an opportunity to bring an application for a postponement in order to obtain further legal assistance she consciously decided not to do so. In these circumstances I do not consider that there is a reasonable prospect that a court of appeal will come to a different conclusion on the grounds set out in paragraphs 1-3 of the notice of application for leave to appeal.

[16] I have indicated repeatedly that, *ex facie*, the record she was at all times assisted by an attorney of record. It appears from the file that *ex post facto*, after the

completion of the trial and on 29 November 2016 correspondence was received by the Registrar's office from attorneys M B Pedersen and Associates in Durban enclosing a notice of withdrawal as attorneys of record which appears*, ex facie* the proof of posting annexed thereto, to have been forwarded by registered post to the applicant on 14 October 2016. It was, however, only sent to the registrar, apparently by ordinary mail, under cover of a letter dated 26 October 2016. The date of dispatch of the letter is not apparent from the file. This withdrawal too was never referred to at the trial and, *ex facie* the record, the applicant herself was unaware of the development. In this regard it is significant that the court file reflects that the affidavit, prepared in appropriate form, purportedly by attorney Brent Pienaar, for a postponement at the resumed hearing (on 7 November 2016) was filed under the name of Attorney Pienaar as was the later special plea. Indeed, on 16 March 2017 the applicant filed a notice of address for service of notices in which she states that she first received the notice of withdrawal on 14 March 2017. In all the circumstances neither the applicant nor the court had knowledge of the existence of the notice of withdrawal of her mandated attorney of record. The documents contain no indication of its having been sent to or delivered to respondent's attorneys. All documents filed after 16 October 2016 were filed under the name of Attorney Pienaar. In these circumstances the court did not know, nor could it have known of the withdrawal of applicant's attorney.

[17] I turn to the remaining grounds of appeal. The fourth ground of appeal proceeds upon a misunderstanding of the facts. It records:

> "The Counsel for Plaintiff pointed out to the Honourable Court that an amendment may not be made to the bond agreement without both parties

signing an agreement to that effect. The Plaintiff reflected the amended interest, but failed to produce the signed agreement, saying the onus is on the Applicant. Even if the Applicant's copy is lost, the Plaintiff has to produce its copy into evidence and failed to do so."

[18] I have dealt in the judgment with the applicant's assertion that the interest rate provision in the loan agreement was amended. The respondent's case was that it did not occur and it was put to the applicant in evidence that respondent does not accept her version of events. On the respondent's case therefore there is no amended agreement which could be discovered. The agreement always was, from the outset, for a variable rate of interest. In the circumstances I do not think that there is a reasonable prospect that another court would come to a different conclusion on the basis of this ground of appeal.

[19] The ninth and tenth grounds of appeal relate to the production of the original of the loan agreement. These grounds record:

"9. The Plaintiff failed to produce the original signed loan agreement. These documents are used for securitisation. The Plaintiff therefore unlikely had *locus standi*, in the first place. Rule 32(2) requires a Plaintiff to submit the original signed document in order to proceed with a claim.

10. The Plaintiff's Regional Manager said under testimony she did not know what the insurance of the loan agreement was for. It is common knowledge that banks insure their loans against default and was thus already paid for the Applicant's default. In the interest of justice the Plaintiff must make the full facts available to the Court regarding securitisation and whether they insured this loan according to practice and was already paid for it (possibly twice)."

[20] As recorded in the judgment it is common cause that the copy of the agreement annexed to the particulars of claim is a true copy of the original. Neither the signature nor the terms of the agreement are in dispute. Securitisation was neither pleaded nor raised in the trial. It was never an issue in the trial. Similarly it was neither pleaded nor alleged that the defendant had been paid for its loss from any other source. Non-securitisation and insurance against loss do not form part of the respondent's cause of action and accordingly there is no obligation on a plaintiff to prove these issues unless they are raised in the pleadings. For these reasons I do not think that these grounds hold a reasonable prospect of success on appeal.

[21] The grounds set out in paragraphs 5, 6, 7, 8, 11 and 13 of the notice of application for leave to appeal, as amended were fully dealt with in argument at the trial. I have set out the reasons for the conclusion to which I came in my judgment. There can be no purpose in repeating same herein. I do not think that these grounds hold a reasonable prospect of success for the reasons set out in the judgment.

[22] Finally, in the amended application for leave to appeal the applicant raised a further ground of appeal that the court of first instance had misdirected itself in not including the *in duplum*-rule in its verdict. The *in duplum*-rule stipulates that interest may not exceed the amount of the outstanding capital in respect of the principal debt. Once interest reaches parity with the amount outstanding on the capital interest ceases to run until judgment is granted. (See ***Paulsen and Another v Slip Knot Investments (Pty) Ltd*** 2015 (3) SA 479 (CC).)

[23] The present matter concerns a loan account which is a credit agreement in terms of the provisions of the National Credit Act 34 of 2005 (the NCA). The NCA contains its own statutory *in duplum* provision set out in section 103(5). It provides that, notwithstanding any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)(b) to (g) that accrues during the time that the consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under the credit agreement as at the time that the default occurs. The amounts set out in section 101(1) are not limited to interest and include additional charges to which I shall refer as section 101 charges. I shall assume for purposes hereof that the ground of appeal is directed at the statutory *in duplum*-rule as formulated in the NCA.

[24] This ground of appeal too was not raised in the pleadings, nor in the evidence at the trial, nor in argument. It has accordingly not been addressed in the judgment. I have given careful consideration to this ground of appeal and to the submissions made during argument in the application for leave to appeal. I do not consider that there is a reasonable prospect that another court will come to a different conclusion based on this ground of appeal. My reasons therefore are threefold.

[25] Firstly, the loan agreement, the terms of which are not in dispute, stipulates that:

> "A certificate signed by a manager of the bank specifying the amount owing by the borrower to the bank and further stating that such an amount is due, owing and payable by the borrower to the bank, shall be *prima facie* (rebuttable) proof of the amount thereof and of the fact that such amount is so due, owing and

payable for the purpose of obtaining provisional sentence or other judgment in any competent court as well as execution under the covering mortgage bond ….”

[26] The witness Fourie, who holds the position of a Risk Mitigation Manager, Retail Collections and Recoveries in the respondent prepared such a certificate which reflected that as at 28 July 2015 an amount of R770 057 was due, owing and payable under the loan. As recorded in the judgment his calculation was not challenged.

[27] In ***Senekal v The Trust Bank of South Africa Limited*** [1978] 4 All SA 43 (A) the Appellate Division (now the Supreme Court of Appeal) considered the effect of such a certificate. Miller JA held at p. 47-48:

‘… As was pointed out by STRATFORD JA in *Ex parte Minister of Justice: In re R* v *Jacobson and Levy* 1931 AD 466 at 478:

“*Prima facie* evidence, in its more usual sense, is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence.”

If *the prima facie* evidence or proof remains unrebutted at the close of the case, it becomes “sufficient proof” of the fact or facts (on the issues with which it is concerned) necessarily to be established by the party bearing the *onus* of proof. (*Salmons* v *Jacoby* 1939 AD 588 at 593.)

The *onus* in this case was clearly on the respondent to establish the amount of the indebtedness of the principal debtor, Luna. (See *Narlis* v *South African Bank of Athens* 1976 (2) SA 573 (A) at 579G-H.) It sought to discharge that *onus, inter alia, by* production of the certificate which, by agreement between the parties, was to be regarded as *prima facie* evidence (or proof) of the amount of such indebtedness. The inquiry, then, in the light of what I have just said, is whether at the end of the case the *prima facie* evidence afforded by the certificate had been so disturbed as to prevent its becoming sufficient proof. … There is no question of the certificate transferring the *onus*, in the full sense of the word, to the

> appellant, but in the light of the provisions of the certificate clause in the deed of suretyship, the appellant could only at his peril refrain from giving or leading evidence to counter the *prima facie* proof of the amount of the indebtedness afforded by the certificate."

[28] In ***Senekal*** the appellant contended that the certificate reflected erroneously calculated or illegally charged interest or finance charges having regard to the provisions of the limitation and disclosure of Finance Charges Act, 73 of 1968 (the Act). In this regard Miller proceeded at p. 51-52:

> '…in general, it was contended that the learned Judge had misdirected himself by burdening the appellant with the *onus* of proving that the claim for interest was excessive. (Cf *Wolsdorf* v *Fisher* 1977 (4) SA 74 (D).) For present purposes I shall assume that the *onus* was on the respondent to prove not only the amount of the indebtedness (I have already mentioned that such *onus* was on the respondent) but also that such amount was arrived at in consonance with, not in breach of, the Act and that it was recoverable according to law. On that assumption, it appears to me that a mere "suspicion" that, in arriving at such amount, interest might have been calculated at an excessive and unlawful rate is not in itself sufficient to justify non-suiting the respondent. I accept that a certificate such as we are now concerned with, although it provides *prima facie* evidence or proof of the amount of the debt, calculated according to the agreement and the transactions between the bank and its customer, does not furnish proof of the enforceability of the agreement or the legality of the claim for payment of that amount. But in a case such as this, when the appellant, faced with a claim for an established amount owing by the principal debtor in terms of his agreement with the respondent (which on its face appears to be a valid and enforceable agreement) contends that such agreement is unlawful and cannot be enforced because an unlawful rate of interest was charged, he must at least refer to facts or adduce evidence of such a nature as to throw into judicially cognizable doubt the validity or legality of the claim."

[29] These comments appear to me to be equally apposite in the present case. The effect thereof, it seems to me, is that where the certificate prepared by Mr Fourie remains unchallenged a mere "suspicion", in the absence of facts or evidence to the contrary, that interests which exceed the *in duplum* amount may have been included in the calculation, is not sufficient.

[30] Secondly, as set out earlier herein, the issue was not raised in the pleadings nor during the trial. In ***F & I Advisors (Edms) Beperk v Eerste Nasionale Bank van Suid-Afrika Beperk*** 1999 (1) SA 515 (SCA) the Supreme Court of Appeal considered a claim based on an overdrawn account. It concluded that it could not be expected of a plaintiff to set out the composition of his claim unless the underlying debts were placed in dispute. Harms JA stated the general rule that issues had to be formulated in the pleadings. The non-infringement of the *in duplum*-rule, he noted, had not been part of the appellant's cause of action and in those circumstances it was not expected of the court of its own accord to determine whether such a rule had been contravened nor would a court act on the grounds of a mere suspicion.

[31] These findings appear to me to be of equal application in the present matter. The non-infringement of the *in duplum*-rule does not constitute an essential part of the respondent's case and the respondent has not been challenged to prove that the interest and other section 101 charges do not exceed the outstanding capital on the principal debt as at the date of default.

[32] Thirdly, notwithstanding the form of the pleadings the respondent did in fact prepare a certificate in terms of section 15(4) of the Electronic Communications and Transactions Act, 25 of 2002 which contained a full print-out of the applicant's account in respect of the loan. Whilst it is apparent from the calculations that the applicant fell in arrears almost immediately upon the inception of the loan a number of large payments were made from time to time which in each case extinguished all arrear payments and effectively reinstated the agreement as envisaged in section 129(3) of the National Credit Act. The calculation shows further that on 16 January 2012 the applicant was last in credit in respect of the contractual payments due. The relevant default, for purposes of section 103(5) of the NCA occurred on 28 January 2012. As at 28 January 2012 the balance due on the account amounted to R502 081,33.

[33] Section 126(3) of the NCA stipulates that a credit provider must credit each payment made under a credit agreement to the consumer as of the date of receipt of payment as follows:

> "(a) Firstly, to satisfy any due or unpaid interest charges;
> (b) Secondly, to satisfy any due or unpaid fees or charges; and
> (c) Thirdly, to reduce the amount of the principal debt."

(The loan agreement contains a similar provision.)

[34] As set out earlier the calculation reveals that the applicant fell into arrears from the very inception of the agreement. Where the outstanding balance as at 28 January 2012 still exceeded the entire sum of the principal debt it is apparent that the principal debt, as at the date of default, had not been reduced at all. All

payments made up to this date have been allocated to unpaid interest and other section 101 charges and the outstanding balance on the principal debt remained in the amount of R490 000.

[35] The detailed account further reflects interest charged from the date of the default reflected earlier herein to 28 July 2015 in the amount of R284 378,76. Further section 101 charges which accrued during the period of default up to 28 July 2015 amounted to R24 666,94. The total of the interest and other section 101 charges as envisaged in section 103(5) of the NCA accordingly amounted to R309 045,70.

[36] Judgment was delivered on 31 January 2017. The addition of interest calculated at 12,95% from 28 July 2015 to the date of judgment amounts to a further R165 942,36. The aggregate of the interest which accrued during the period of default up to the date of judgment and the further section 101 charges as charges envisaged in section 103(5) of the NCA therefore amounted to R474 988,06. In these circumstances the evidence presented establishes that no infringement of section 103(5) of the Act occurred.

[37] For these reasons I do not think that this ground of appeal can succeed either.

[38] In the result, the application for leave to appeal is dismissed with costs.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Applicant:	In person
For Respondent:	Adv Beyleveld SC instructed by McWilliams & Elliot Inc, Port Elizabeth