

SOUTH AFRICA / JUDGMENT

Absa Bank Beperk v Mbuli (3097/05)

[2005] ZAGPHC 55 (16 May 2005)

[2005] ZAGPHC 55

COURT

High Courts - Gauteng

BEFORE

JCW van Rooyen

CASE / FILE NUMBER

3097/05

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THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION) REPORTABLE Date: 12, 16 May 2005 16/5/2005 Case No.: 3097/2005 In the matter between: ABSA BANK BEPERK APPLICANT and REUBEN JOHNSON MBULI FIRST RESPONDENT Summary Judgment-facts relied on not amounting to a pactum de non petendo-oral variation of contract accordingly not permitted in the light of SA Sentrale KO-op Graanmaatskappy Bpkv Shifren en Andere 1964(4) SA 760(A); Brisley v Drotzky 2002(4) SA 1(SCA) and HNR Properties and Another v Standard Bank of SA Ltd 2004(4) SA 471(SCA). Van Rooyen AJ[1] This is an application for summary judgment on a loan for a house, secured by a mortgage bond in favour of the applicant ("the bank"). Execution of the bond is sought to pay the debt, which had, according to the summons, been in arrears since the 14th December 2004.[2] The respondent filed an affidavit in which he explained that he and a Mr Smith, head of the applicant's credit division, had entered into an oral agreement on the 17th September 2004, after respondent had lost his job. It is alleged that it was "decided" that the respondent would sell some motor vehicles so as to satisfy the more urgent debts, which the respondent had with the applicant. On this occasion it was agreed, on the recommendation of a Mr Smith from the Bank, that a recovery plan be implemented. Option 1: applicant obtaining a better paying job so that he could honour his obligations in terms of the mortgage bond. Should this fail, the option 2 was that respondent was to sell the property so as to attract the highest bid and then pay his debts. It is alleged that it is an express, implied, alternatively tacit agreement was reached that the applicant waived or suspended all its rights to sue or call for immediate performance on the bond.[3] In the light of this alleged agreement the respondent proceeded to apply for senior positions with the hope of securing a position and paying his debts. He attached 8 applications for top posts (from Deputy Director to Deputy Director-General) in the civil service, which fell within the range of his doctor's degree in law. He also sent post-dated cheques for R6125,00 for 21 December 2004, 20 January 2005, 1 March 2005, 1 April 2005 and 2 May 2005 to the Bank. Respondent referred to these cheques in an undated letter and stated that he had been unable to pay the down payments as a result of high electricity and water accounts for October and November

2004. The letter is stated to have been sent on 9 December 2004. It was stated in the letter that the cheques were "guaranteed and there may be a need to convert to stop order method as soon as the bank and the respondent may agree." The payments included an additional amount to take care of arrears. When he realized that a considerable period had lapsed and that he could no longer rely on the first option, he decided to implement option 2. However, before he could pursue this avenue the applicant, without prior notice, served summons on the respondent on the 8th February 2005.[4] When the summons was served, respondent stopped payment of the last four cheques, the first being that for 20 January 2005.3[5] Mr Leopeng, for the respondent, argued that a pactum de non petendo had been entered into between the Bank and the respondent and that such an oral contract was compatible with the provisions in the contract, which permitted amendment "in writing" in clause 8. He referred me to a judgment of Ntsebeza AJ in *Miller and Another v NNO v Dannecker* 2001(1) SA 928(C). In the latter judgment special weight was given to the judgment of Hiemstra J in *Impala Distributors v Taunus Chemical Manufacturing Co* 1975(3) SA 273(T) where it was held that a pactum de non petendo did not amount to a variation or a waiver which is required to be in writing by the contract, but co-existed with a contract in the sense that it merely suspended the enforceability of a contract for a specified period or the occurrence of some contingency.[6] In the *Miller* judgment Ntsebeza AJ placed reliance on the approach of Seligson AJ in *District Bank Ltd v Hoosain and Others* 1984(4) SA 544(C) where it was held that although the details set out in the answering affidavit in a summary judgment matter might be vague, "despite the baldness and ineptness of the allegations made, ... the defendants have raised a triable and arguable issue as to the plaintiff's entitlement to sue for recovery of the debt at the time when it did." (at 550A). Ntsebeza AJ also held that "if nothing else, the defendant in *casu* would successfully hold the plaintiffs to the pactum on the grounds that the agreement must be taken to have been entered into in good faith." [7] The reference to good faith in the *Miller* judgment was overruled by the Supreme Court of Appeal in *Brisley v Drotsky* 2002(4) SA 1(SCA). Otherwise the importance of the basic rule against oral amendment, where it is prohibited in the contract, was emphasized in the light of *SA Sentrale KO-op Graanmaatskappy Bpk v Shifren en Andere* 1964(4) SA 760(A). That the Supreme Court of Appeal has, however, not abandoned the role of a pactum de non petendo, appears from *HNR Properties and Another v Standard Bank of SA Ltd* 2004(4) SA 471(SCA) where Scott JA, at para [19] states the following after having referred to the *Shifren* and *Brisley* judgments of the Court: "Courts have in the past, often on dubious grounds, attempted to avoid the *Shifren* principle, where its application would result in what was perceived to be a harsh result. Typically, reliance has been placed on waiver and estoppel. No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve the violation of the *Shifren* principle, for example, where it amounts to a pactum de non petendo or an indulgence in relation to previous imperfect performance"¹¹ Reference is made to Hutchinson 'Non- variation Clauses in Contract: Any Escape from the *Shifren* Straightjacket' (2001) 118 SALJ 720.[8] What appears clearly from the *HNR Properties* judgment is that an oral variation of an installment clause would be in conflict

with the Shifren principle - see para [20]. In Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd 2004(2) SA 353(W) Cilliers Al rejected the argument that a clause in a contract amounted to a pactum de non petendo: "The appellants sought to rely on the provisions of clause 6 as containing a pactum de non petendo. This clause is aimed - however legally ineffective it may be - at an adjustment of the rights or obligations of parties in circumstances set out therein. It does not contain any undertaking not to sue in respect of any liability which does accrue as a result of a breach. The contention based on an alleged pactum de non petendo therefore cannot succeed." (emphasis added)[9] I am not convinced that the arrangement of the Respondent with the Bank in the present matter amounted to a pactum de non petendo. The arrangement is clearly aimed at a variation of the installments and obtaining some form of indulgence as to the non-payment of such payments. Even if it is accepted that the bank official assisted the Respondent in working out a plan as to how payment could be achieved, there is no indication that the bank was undertaking not to sue him. The acceptance of the December cheque, also does not amount to a waiver of past errors. The Respondent had not paid his 5 installments in October and November 2004. Any payment after that simply amounted to the paying of an installment, although it was obviously not sufficient to cover the lapses in the previous two months. There is also no indication that the Bank accepted the installment plan set out in the 9 December letter of the respondent. He, in any case, cancelled the January cheque on his own version. As rightly argued by Mr Harms, the excuse for canceling the January cheque in the light of the summons is questionable since the summons was only served on Respondent on 8 February 2005. The cancellation, in any case, seems to be in conflict with the Respondent's statement in the 9 December letter that the "above-mentioned payments are guaranteed". If "guaranteed" he would not have been able to cancel the cheques.[10] I have considered the argument that the response in a summary judgment need not be that explicit and well-founded. As long as it is arguable in a trial, it should suffice (see the remarks of Seligson AJ quoted above). However, to my mind, the arrangements made do not justify an inference that the bank had undertaken not to sue. At the most the arrangements amounted to an interim variation of the installments and an indulgence in this respect. The application is allowed with costs on the scale of attorney and client. The immovable property mortgaged is declared executable so as to pay the debt of R609327,19 plus interest at the rate of 11% per annum, monthly calculated and capitalized, as from 14 December 2004 to date of payment. JCW van Rooyen. Acting Judge of the High Court 16 May 2005. For the Applicant: adv CHarms For the Respondent: adv PM Leopeng

THE HIGH COURT OF

SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

REPORTABLE

Date: 12, 16 May 2005

16/5/2005

Case No.: 3097/2005

In the matter between:

ABSA BANK BEPERK

APPLICANT

and

REUBEN JOHNSON MBULI FIRST RESPO

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Summary Judgment-facts relied on not amounting to a pactum de non petendo-oral variation of contract accordingly not permitted in the light of SA Sentrale KO-op Graanmaatskappy BpkvShifren en Andere1964(4)SA 760(A); BrisleyvDrotsky 2002(4) SA 1(SCA) and HNR Properties and AnothervStandard Bank of SA Ltd 2004(4) SA471(SCA).

Summary Judgment

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v

Shifren en Andere

1964(4)

SA 760(A); Brisley

Drotsky 2002(4) SA 1(SCA) and HNR Properties and Another

Standard Bank of SA Ltd 2004(4) SA

471

(SCA).

Van Rooyen AJ

[1] This is an application for summary judgment on a loan for a house, secured by a mortgage bond in favour of the applicant ("the bank").

Execution of the bond is sought

to

pay the debt, which had, according to the summons, been in arrears since the 14

th

December

2004.

[2] The respondent filed an affidavit in which he explained that he and a Mr Smith, head of the applicant's credit division, had entered into an oral agreement on the

17

September 2004, after respondent had lost his job. It is alleged that it was "decided" that

the respondent would sell some motor vehicles so as to satisfy the more urgent debts,

which the respondent had with the applicant. On this occasion it was agreed, on the

2

recommendation of a Mr Smith from the Bank, that a recovery plan be implemented. Option 1: applicant obtaining a better paying job so that he could honour his obligations in terms of the mortgage bond. Should this fail, the option 2 was that respondent was to sell the property so as to attract the highest bid and then pay his debts. It is alleged that it an express, implied, alternatively tacit agreement was reached that the applicant waived or suspended all its rights to sue or call for immediate performance on the bond.

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[3] In the light of this alleged agreement the respondent proceeded to apply for senior positions with the hope of securing a position and paying his debts. He attached 8 applications for top posts (from Deputy Director to Deputy D

irector-General) in the civil

service, which fell within the range of his doctor's degree in law. He also sent post-dated cheques for R6125,00 for 21 December 2004, 20 January 2005, 1 March 2005, 1 April 2005 and 2 May 2005 to the Bank. Respondent referred to these cheques in an undated letter and stated that he had been unable to pay the down payments as a result of high electricity and water accounts for October and November

2004. The letter is stated to have been sent on 9 December 2004. It was stated in the letter that the cheques were "guaranteed and there may be a need to convert to stop order method as soon as the bank and the respondent may agree." The payments included an additional amount to take care of arrears. When he realized that a considerable period had lapsed and that he could no longer rely on the first option, he decided to implement option 2. However, before he could pursue this avenue the applicant, without prior notice, served summons on the respondent on the 8

February 2005.

[4] When the summons was served, respondent stopped payment of the last four cheques, the first being that for 20 January 2005.

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[5]

Mr Leopeng,

for the respondent, argued that a

pactum de non petendo

had been entered into between the Bank and the respondent and that such an oral contract was compatible with the provisions in the contract, which permitted amendment "in writing" in clause 8. He referred me to a judgment of Ntsebeza AJ in

Miller and Another NNO

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2001(1) SA 928(C). In the latter judgment special weight was given to the judgment of Hiemstra J in

Impala Distributors

Taunus Chemical Manufacturing Co

1975(3) SA 273(T) where it was held that a

did not amount to a variation or a waiver which is required to be in writing by the contract, but co-existed with a contract in the sense that it merely suspended the enfor

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specified period or the occurrence of some contingency.

[6] In the

Miller

judgment Ntsebeza AJ placed reliance on the approach of Seligson AJ in

District Bank Ltd

Hoosain and Others

1984(4) SA 544(C) where it was held that although the details set out in the answering affidavit in a summary judgment matter might be vague, "despite the baldness and ineptness of the allegations made, ... the defendants have raised a triable and arguable issue as to the plaintiff's entitlement to sue for recovery of the debt at the time when it did." (at 550A). Ntsebeza AJ also held that "if nothing else, the defendant

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would successfully hold the plaintiffs to the

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on the grounds that the agreement must be taken to have been entered into in good faith." [7] The reference to good faith in the

judgment was overruled by the Supreme Court of Appeal in

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states the following after having referred to the

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judgments of the

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" Courts have in the past, often on dubious grounds, attempted to avoid theShifrenprinciple, where its application would result in what was perceived to be a harsh result. Typically, reliance has been placed on waiver and estoppel. No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve the violation of theShifrenprinciple, for example, where it amounts to apactum de non petendoor an indulgence in relation to previous imperfect performance"¹¹Reference is made to Hutchinson 'Non-variation Clauses in Contract: Any Escape from the Shifren Straightjacket' (2001) 118SALJ720.

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principle, where its application would result in what was perceived to be a harsh result. Typically, reliance has been placed on waiver and estoppel. No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve the violation of the principle, for example, where it amounts to a

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Reference is made to Hutchinson 'Non- variation Clauses in Contract: Any Escape from the Shifren Straightjacket' (2001) 118

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[8] What appears clearly from the

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principle - see para [20]. In

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Cradock Heights (Pty) Ltd

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Al

rejected the argument that a clause in a contract amounted to a

pactum de non petendo:

" The appellants sought to rely on the provisions of clause 6 as containing a pactum de non petendo. This clause is aimed - however legally ineffective it may be - at an adjustment of the rights or obligations of parties in circumstances set out therein. It does not contain any undertaking not to sue in respect of any liability which does accrue as a result of a breach. The contention based on an alleged pactum de non petendo therefore cannot succeed." (emphasis added)

" The appellants sought to rely on the provisions of clause 6 as containing a

pactum de non petendo.

This clause is aimed - however legally ineffective it may be - at an adjustment of the rights or obligations of parties in circumstances set out therein.

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therefore cannot succeed." (emphasis added)

[9] I am not convinced that the arrangement of the Respondent with the Bank in the present matter amounted to a

The arrangement is clearly aimed

at variation of the installments and obtaining some form of indulgence as to the non-payment of such payments. Even if it is accepted that the bank official assisted the

Respondent in working out a plan as to how payment could be achieved, there is no indication that the bank was undertaking not to sue him. The acceptance of the December cheque, also does not amount to a waiver of past errors. The Respondent had not paid his

5

installments in October and November 2004. Any payment after that simply amounted to the paying of an installment, although it was obviously not sufficient to cover the lapses in the previous two months. There is also no indication that the Bank accepted the installment plan set out in the 9 December letter of the respondent. He, in any case, cancelled the January cheque on his own version. As rightly argued by

Mr Harms,

the excuse for canceling the January cheque in the light of the summons is questionable since the summons was only served on Respondent on 8 February 2005. The cancellation, in any case, seems to be in conflict with the Respondent's statement in the 9 December letter that

the -"above- mentioned payments are guaranteed". If "guaranteed"

he would not have been able to cancel the cheques.

[10] I have considered the argument that the response in a summary judgment need not be that explicit and well-founded. As long as it is arguable in a trial, it should suffice (see the remarks of Seligson AJ quoted above). However, to my mind, the arrangements made do not justify an inference that the bank had undertaken not to sue. At the most the arrangements amounted to an interim variation of the instalments and an indulgence in this respect. The application is allowed with costs on the scale of attorney and client. The immovable property mortgaged is declared executable so as to pay the debt of R609327,19 plus interest at the rate of 11% per annum, monthly calculated and capitalized, as from 14 December 2004 to date of payment.

[10] I have considered the argument that the response in a summary judgment need not be that explicit and well-founded. As long as it is arguable in a trial, it should suffice (see the remarks of Seligson AJ quoted above). However, to my mind, the arrangements made do not justify an inference that the bank had undertaken not to

sue.

At the most the arrangements amounted to an interim variation of the instalments and an indulgence in this respect. The application is allowed with costs on the scale of attorney and client. The immovable property mortgaged is declared executable so as to pay the debt of R609

327,19 plus interest at the rate of 11

%

per annum, monthly calculated and capitalized, as from 14 December 2004 to date of payment.

JCW van Rooyen .

Acting Judge of the High Court 16 May 2005

For the Applicant:

adv CHarms

For the Respondent:

adv PM Leopeng

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