

SOUTH AFRICA / JUDGMENT

Albaraka Bank v New Turn Investments (Pty) Ltd (D3715/2021)

[2023] ZAKZDHC 43 (18 July 2023)

[2023] ZAKZDHC 43

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mossop J

CASE / FILE NUMBER

D3715/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

no: D3715/2021

In

the matter between:

ALBARAKA

BANK

APPLICANT

and

NEW

TURN INVESTMENTS (PTY) LTD RESPONDENT

Coram: Mossop

J

Heard: 18

July 2023

Delivered: 18

July 2023

ORDER

The

following order is granted:

There

will be an order in terms of paragraphs 1 to 7 of the notice of motion, save that there shall be no order in terms of sub-paragraph 3.3 thereof.

JUDGMENT

Mossop J:

- [1] This is an ex tempore judgment.
- [2] The applicant is a company that carries on business as an authorised financial services provider in terms of the banking laws of this country. In conducting its business activities, the applicant, inter alia, observes Sharia law and the principles attached thereto. The respondent is also a company, duly incorporated in terms of the company laws of this country. Its guiding mind, being the deponent to its answering affidavit, Ms Fahima Khan (Ms Khan), is an adherent to the Islamic faith.
- [3] The applicant and the respondent concluded a series of agreements to permit the applicant to advance a loan to the respondent to allow it to purchase an immovable property. Because both parties to the agreements follow the prescripts of the Islamic faith, the agreement had to be structured in a fashion that kept it within the parameters of the principles of that faith. The structure of the agreements will be considered shortly. The applicant alleges that the respondent has breached the agreements that were concluded and seeks to terminate its relationship with the respondent and claim the amounts that it is alleged are due to it. This appears to be opposed by the respondent which, essentially, denies that it is presently in breach of the agreements concluded with the applicant.
- [4] This morning the applicant was represented by Ms Miranda. Mr Tucker appeared for the respondent. Both counsel are thanked for their interesting and helpful arguments.
- [5] Before considering the nature of the relief claimed by the applicant in its notice of motion, it is necessary to describe the structure of the agreements. Only with this understanding is the relief claimed understandable.
- [6] The applicant offers its customers specialised services and products compliant with Sharia law which cater, inter alia, for Islam's

prohibition on the charging of interest. Indeed, it appears that the entire scheme utilised in this matter was designed to permit the applicant to derive a profit from the transaction that it agreed to with the respondent without breaching the injunction against interest being charged. Simply put, the respondent required a loan from the applicant to purchase an immovable property and the applicant was prepared to grant it the loan. The parties agreed that the method of advancing the loan should be the creation of a property partnership agreement. Accordingly, on 29 May 2018, the parties concluded three interrelated agreements:

- (a) A musharaka agreement, which is described as an agreement to purchase equity. It required the applicant to purchase undivided shares in the immovable property to be acquired. This agreement determined that the quantum of the loan amount would be R1 650 000. The applicant would purchase 90% of the undivided shares in the immovable property for the

sum of R1 485 000 and the respondent would take up the other 10% of the undivided shares for the sum of R165 000. The parties agreed to share profits and losses. As security for the loan to be advanced to it, the respondent would register a mortgage bond over the immovable property to be acquired. In the event of a breach of the musharaka agreement by the respondent, the applicant would be entitled to terminate it by giving the respondent one calendar month's written notice of its intention to terminate it. The concept of a musharaka agreement is recognised in our law and is defined in section 24JA(1) of the Income Tax Act, 1962;

- (b) A unilateral promise agreement, in terms of which the respondent undertook to purchase the applicant's undivided share in the immovable property to be acquired. This would be acquired over a period of 240 months in successive annual acquisitions. In the event of the respondent breaching the promise, the applicant would be entitled to terminate the agreement and recover its damages from the respondent. Its damages would cover the difference between the fair market value of the applicant's undivided share in the immovable property to be acquired, calculated at the date of the breach of the promise, and the lower amount representing the net proceeds of the sale of the applicant's undivided share realised by the sale of the immovable property by public auction or by a bona fide private sale; and
 - (c) An overriding agreement, in terms of which it was also agreed that the length of the musharaka agreement would be 240 months. It was furthermore agreed that the respondent would purchase the applicant's undivided share in the immovable property in monthly instalments of R14 825.94 over that period. In the event of a breach of that agreement by the respondent, the applicant was required to give it seven days' written notice to remedy that breach, failing which the applicant would be entitled to cancel the agreement. Upon breach, the applicant would be entitled to claim all amounts under the agreement forthwith and the respondent agreed to pay the applicants costs on an attorney and own client scale.
- [7] Thus, over the duration of the three agreements the respondent would acquire the applicants undivided share in the immovable property to be acquired so that at the end of the agreement period it would have acquired the entirety of the applicant's interest in the immovable property. It appears that because the respondent was required to repay the applicant in fixed instalments in respect of which no mention is made of interest, this arrangement complied with Sharia law. The applicant still, however, would make a profit from the transaction. As the respondent itself states:

'Instead of interest being charged on a monthly basis, it is already amortised upfront and incorporated into the value of the property and in the yearly sales of equity, so bought back.'

The immovable property to be acquired would be registered in the name of the respondent, who would hold it on behalf of the partnership. The loan amount was advanced and the immovable property acquired.

[8] The applicant alleges that the respondent failed to pay its monthly instalments regularly. In July 2020 it breached the agreements. As of 7 July 2020, it was in arrears in the amount of R23 985.06. The arrears were not made good, and on 18 November 2021, the applicant elected to terminate the agreements, having given the prescribed one month's written notice. While this amount appears to be relatively small, this was a repeated failure of the respondent to pay in accordance with its obligations and is the straw that broke the camel's back.

[9] That background hopefully helps in providing a clearer understanding of the relief claimed by the applicant in its notice of motion. It seeks an order declaring the partnership in respect of the immovable property that is the subject of the three agreements, and which has the formal description of Portion 1 of Erf 13, Chiltern Hills, to be terminated.[1] To achieve the winding up of the partnership property, it seeks the appointment of a liquidator with certain defined powers. Those powers appear to extend beyond the powers ordinarily afforded liquidators in this division: ordinarily the powers identified in *Muhlmann v Muhlmann*[2] are granted to liquidators. I asked Ms Miranda to address me on this aspect and in particular the power to interrogate claimed in paragraph 3.3 of the notice of motion. Ms Miranda appeared to accept that if there was some reason why the powers sought in the notice of motion could not be granted then they ought not to be granted but she needed to take instructions in that regard. She later confirmed this to be her instructions.

[10] In my view, the proposed liquidator cannot be afforded the power of interrogation. A similar power was sought in *Morar NO v Akoo and Another*[3] but was refused. On appeal to the Supreme Court of Appeal, Wallis JA stated that:

'The power to order an interrogation is an exceptional power and I can find no basis upon which it is one that courts can confer upon liquidators of partnerships. If that is a shortcoming the remedy must lie in legislation.' (footnotes omitted)

[11] Every co-owner is, in principle, entitled to have that joint-ownership terminated.

A co-owner is not obliged to remain a co-owner against his or her will.[4] It therefore follows that not many defences can be raised against the claim of a co-owner to have a joint ownership arrangement terminated.[5] It appears to be common cause in this matter that the *actio communi dividundo* applies to this matter and I shall approach it on that understanding.

[12] The applicant having unequivocally indicated that it seeks to undo the property partnership agreement, the respondent offers up two defences on the merits. The first is that any arrears owing by the respondent to the applicant have been made good. The respondent states that the default in making payments of which the applicant complains has been rectified and the respondent cannot therefore understand why the applicant persists in seeking the relief that it seeks. Ms Khan addresses the issue as follows:

'While there was a time where the Respondent had fallen in arrears with such payments, these payments were brought up to date in full on 19 July 2022 when an amount of R142 651.19 was paid.'

- [13] The second defence is that whilst the immovable property is registered in the name of a juristic entity, it is a domestic residence with warm bodied persons who reside there. Those persons, according to the respondent, are entitled to the protection of section 26 of the Constitution and Uniform Rules 46 and 46A respectively.
- [14] Inherent in the first defence is an admission by the respondent that it failed to maintain its agreed payments to the applicant. For arrears to be made good, there must, a fortiori, be arrears. And for arrears to exist, there must generally be a failure to comply with a payment obligation. The respondent, however, denies that the applicant sent it a breach letter followed by the cancellation letter and it therefore denies that the applicant consequently cancelled the agreements on 18 November 2021.
- [15] These appear to me to be unmeritorious denials. The breach letter was addressed to the respondent's guiding mind, Ms Khan, at an email address and to a Mr Khan, also at an email address. There is no denial by either of them that the email addresses are not theirs. The breach letter physically exists and is appended to the founding affidavit. The cancellation letter also physically exists and is likewise appended to the founding affidavit as an annexure. It is addressed to Ms Khan by way of an email address and it was also sent by registered mail. There is no indication that it was not received by Ms Khan. Both letters were drafted by the applicant's attorneys. The cancellation letter, dated 18 November 2021, comprises three pages and is exquisitely detailed: it sets out the entire history of the relationship of the parties and at paragraph 16 thereof the following appears:

'As a result, and duly instructed by our client, we hereby give you NOTICE of our client's TERMINATION of the MUSHARAKA FINANCE

AGREEMENT in respect of the property with immediate effect.'

- [16] Mr Tucker very fairly conceded that the respondent had not acted in terms of the demand made of it to rectify its conduct. Despite the respondent's denial on the papers, I must therefore find that due and proper notice was given and the musharaka agreement has been cancelled.
- [17] Mr Tucker also submitted that the cancellation of the musharaka agreement did not necessarily lead to the cancellation of the other agreements concluded. However, both the unilateral promise agreement and the overriding agreement reference the musharaka agreement. The three agreements are clearly to be construed as being inextricably linked the one to the other and the cancellation of the musharaka agreement brings the entire scheme to an end.
- [18] The respondent alleges that its admitted arrears have been expunged because of a payment of the amount of R142 651.19 made by it to the applicant on 19 July 2022. That payment was undoubtedly made. But it was made more than a year after the agreements had been cancelled, on 18 November

2021. Rather than resurrect the now cancelled agreements, the payment simply served to reduce the respondent's overall indebtedness to the applicant. Its payment therefore provides no rebuttal to the relief claimed by the applicant.

[19] The argument was taken further by Mr Tucker when he submitted that what had actually been compromised was the applicant's ability to bring this application. This arose out of a letter, dated 24 June 2022, in which the applicant's representative wrote to the respondent and stated, *inter alia*:

'We request that your client attends to payment of the arrears in the amount of R99 041.05, failing which, our instructions are to proceed with the application which is set down for hearing on 20 July 2022.'

The letter makes it plain that the applicant still regards the agreements as having been cancelled as it refers to the termination of the musharaka agreement. No payment was immediately forthcoming from the respondent, it only being made, as previously stated, on 19 July 2022, the day before the matter was in court. There is in my view, much force in Ms Miranda's argument that the invitation to pay the arrears had lapsed. I cannot in the circumstances find that the applicant has compromised its entitlement to proceed.

[20] The respondent further alleges that it is unfair, or even unconstitutional, that the applicant is able through the order that it seeks to circumvent:

'... certain rights that would be afforded to me in any situation where ordinarily a bank would go after an immovable property (such as section 26 of the Constitution as well as the processes of Rule 46 and 46A of the Uniform Rules of Court) in its achieving the same result.'

[21] There are several difficulties that I have with this proposition. Firstly, the deponent, a natural human being, is not to be equated with the respondent, a juristic entity. Whether the deponent would be afforded certain rights is not the issue as she is not a party to the agreements with the applicant. She agreed to the structuring of the transaction and now cannot claim that she is somehow prejudiced because of the structure. Secondly, the applicant does not seek an order of executability against the immovable property. The relief that it claims is the termination of a partnership relationship relating to the immovable property. In this regard, paragraphs 3.6 and 3.7 of the notice of motion provide as follows:

'3.6 save to the extent necessary to discharge any liabilities of the partnership to third parties, and all the liquidator's fees and disbursements, and to ensure an equitable distribution in accordance with any agreement relating to the partnership, the liquidator shall not realise any assets of the partnership;

3.7 to the extent that it is necessary for the assets of the partnership to be realised, to invite the parties to offer to purchase the partnership property and/or other partnership assets that may come to light, which offer must be made to the liquidator within five (5) business days of the liquidator calling for such offer, and at a price in excess of the appraised value of such property;'

[22] It is accordingly possible that the immovable property may in the future be acquired by the respondent, in which event no discernible

prejudice will accrue to the persons residing within the immovable property. The consequences of the relief sought by the applicant are matters for another day as there is no counter application delivered by the respondent in which any such relief pertaining to the sale of the immovable property is sought. A similar argument was raised in *Britz v Sequeira*,^[6] and at paragraph 18 of the judgment in that matter, the following is stated:

‘Mr Van der Merwe relied upon rule 46A of the Uniform Rules of Court which sets out the circumstances to be considered when immovable

property is to be declared specially executable. In this regard he referred to the fact that the property is occupied by the

respondent, his spouse, as well as his mentally disabled sister. He extensively quoted from *Firststrand Bank Ltd v Folscher & another* and similar matters and *Absa Bank Ltd v Ntsane*. The issue was also more recently dealt with by the full bench in *Absa Bank Ltd v Mokebe* and related cases. However, and notwithstanding the importance attached to a debtor’s right to a roof over his/her head, I am not persuaded that this defence holds any water in casu. If the property is sold, and bearing in mind respondent’s entitlement to payment for his member’s interests in the close corporations, he would have sufficient money to buy a decent dwelling house to ensure a roof over his and his next-of-kin’s heads.’

In this matter, there is a prospect that the respondent may again acquire the immovable property or with its share of the proceeds of the sale of the immovable property it will be able to afford to either acquire, or rent, another property.

[23] In his heads of argument, Mr Tucker submits that:

‘While there is obviously nothing offensive about this structure, the implementation of Musharaka agreement in the dissolution of the partnership cannot be done in a manner that ignores a Defendant’s rights to housing, the protections of Rule 46A in respect of residential property, and the Court’s oversight function in such matter.’ (footnotes omitted)

[24] The respondent is a juristic entity, not the deponent to the respondent’s answering affidavit. I am unconvinced that a juristic entity has a right to housing.

[25] I can conceive of no reason that would make the dissolution of a partnership agreement unconstitutional, for sight must not be lost of the fact that this is what this application is all about. In the circumstances, I grant the following order:

There shall be an order in terms of paragraph 1 to 7 of the notice of motion, save that there shall be no order in terms of sub-paragraph

3.3 thereof.

MOSSOP J

APPEARANCES

Counsel for the applicants: Ms J L Miranda

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Date of argument: 18 July 2023

Date of Judgment : 18 July 2023

[1] The immovable property has a street address of 33 Chearsley Road, Chiltern Hills, Dawncrest, Westville.

[2] Muhlmann v Muhlmann 1984

(3) SA 102 (AD) 103.

[3] Morar NO v Akoo and Another 2011 (6) SA 311 (SCA) para 25.

[4] Robson v Theron 1978

(1) SA 841 (A) at 856H.

[5] Britz v Sequeira

[2020] 2 All SA 415 (FB) para 16.

[6] Britz v Sequeira

[2020] 2 All SA 415 (FB).

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