

SOUTH AFRICA / JUDGMENT

Business Partners Limited v Mahamba (4568/2016) [2019] ZAECGHC 17 (26 February 2019) [2019] ZAECGHC 17

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S M Mbenenge, J M Roberson

CASE / FILE NUMBER

4568/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE NO. CA 151/2018

CASE

NO. 4568/2016

In

the matter between:

BUSINESS
PARTNERS LIMITED
Appellant
and
THABISO
BENEDICTA MAHAMBA
Respondent

JUDGMENT

MBENENGE JP:

- [1] This appeal concerns, in part, what is generally termed a parate executie clause.[1] The matter serves before this court with the leave of the court a quo.[2] The factual matrix is not complicated, as indeed the facts underpinning the case are largely common cause or, at the very least, not disputed.

[2] On 03 March 2008 Alizw'amaHlubi Multi Skilling Centre CC,[3] duly represented by the respondent in her capacity as the sole member of the principal debtor, concluded loan agreements in terms whereof the appellant loaned to the principal debtor the sums of R598 645.00 and R571 533.00, respectively. In terms of the loan agreements it was incumbent on the principal debtor to provide security in the form of a surety bond over the respondent's property, being Erf 3422, Beacon Bay, Buffalo City Metropolitan Municipality, Division of East London.[4]

[3] Pursuant to the agreements, the respondent signed a deed of suretyship in terms whereof she bound herself as surety to the principal debtor "for the performance on demand of the [d]ebt, for an unlimited amount," on 21 February 2008.

[4] On 20 March 2008 a surety bond in favour of the principal debtor was registered over the property. Clause 37 of the surety bond provides:

"... in the event of any default by the Mortgagor in the observance or performance of any of the conditions of this Bond or of the Mortgagor's failure to discharge any obligation or liability to the Mortgagee on the due date thereof or to pay on demand any sum which may be legally claimable by the Mortgagee, then and in such case the Mortgagee shall at its sole option be entitled forthwith to consider the amount of the Mortgagor's indebtedness to be legally claimable and due without notice and the Mortgagee may forthwith proceed for the recovery thereof, and of such other moneys as may be due under and by virtue of this Bond, and to have the mortgaged property declared executable for the full amount of this

Bond, or for such sum as may be due, and the interest to accrue thereon or act otherwise as minded at any time or times, and the exercise or not of any right under this condition or otherwise shall in no way affect the validity of this Bond or prejudice the Mortgagee

in any way." (Emphasis supplied).

[5] During September 2008 the principal debtor concluded three agreements namely, a loan agreement, a royalty agreement and a credit agreement in terms whereof –

(a) the appellant loaned the principal debtor R450 000.00 for the purchase of vehicles, repayable in monthly instalments of R10 824.00;

(b) the principal debtor undertook to pay the appellant 1% royalty on the actual or projected monthly turn over, whichever would be higher; and

(c) the principal debtor purchased various equipment from the appellant for R667 496.69 repayable in monthly instalments of R11 121.69.

[6] Throughout all her transactions, the respondent chose, as her domicilium citandi et executandi,[5] 5 Aloe Road, Blue Bond, Beacon Bay.[6]

- [7] The principal debtor failed to discharge its obligations towards the appellant in terms of the agreements; it failed to pay her instalments, culminating in the appellant instituting action proceedings against the principal debtor and the respondent as the first and second respondents, respectively, seeking payment of various sums owed to the appellant and for an order declaring the property executable.[7]
- [8] In the relevant particulars of claim an allegation was made drawing the respondent's attention to the provisions of section 26(1) of the Constitution[8], which accords to everyone the right to have access to adequate housing, and notification given that in the event of the respondent being of the view that the order for execution would infringe that right, it would be incumbent on her to place before the court information supporting that claim.
- [9] Service of the summons on the respondent was effected by affixing a copy of the summons to the main entrance at the domicilium citandi et executandi. Subsequent thereto, the appellant and the respondent engaged in settlement talks, which culminated in an "agreement to pay debt" (hereinafter otherwise referred to as "the agreement") being concluded by and between the appellant on the one hand, and the principal debtor and the respondent (as surety), on the other, and the appellant signing a special power of attorney, on 21 August 2016.
- [10] In terms of the agreement the principal debtor acknowledged being indebted to the appellant in respect of the loan agreements, credit agreement and royalty agreement and all amounts owing by the principal debtor in relation thereto.
- [11] Besides undertaking to pay the capital amounts due by the principal debtor and all legal costs incurred by the appellant in the recovery of those amounts by certain dates, the principal debtor and the respondent agreed that the appellant "may, in its discretion, seek an order declaring executable the [property] of the [respondent]."[9]
- [12] Clauses 3.2 and 3.3 of the agreement are of significance. They read:
- "3.2 The surety authorizes the creditor to dispose of the property by private treaty or in such other manner as it deems fit. The creditor undertakes to ensure that every effort will be made to dispose of the property at a fair market price. The surety hereby agrees that the nett proceeds of the sale of the aforementioned property shall be utilized in reduction of all the amounts owing by the principal debtor to the creditor.*
- 3.3 The creditor undertakes not to invoke the provisions of paragraph 3.2 hereof unless the principal debtor and/or surety breach the terms of this agreement, in which case the creditor shall be entitled to proceed with the marketing and sale of the property without further notice to the principal debtor and/or surety." (Emphasis supplied).
- [13] Clause 7 provides that the agreement to pay debt shall not amount to a novation of any existing debt or any judgment.

- [14] Clauses 8 and 12 of the agreement are also of relevance. They read:

“8. Should the debtors fail to make payment in terms of this agreement, the full outstanding balance will immediately become due owing and payable to the creditor by the debtor/s and the creditor shall be entitled to immediately proceed with further legal action without further notice to the debtor/s.

...

12. Should the principal debtor and/or surety fail to implement the terms of this agreement, then the principal debtor and surety agree that the creditor may apply for default judgment against them for implementation of the provisions of paragraph 1 above and, in particular, to apply for an Order declaring the immovable property, being Erf 3422 Beacon Bay especially executable.”

[15] On the same date[10] the respondent specifically authorized, by way of a special power of attorney, the appellant “to sell by private treaty or in any manner at such price and on such terms and condition as it may in its sole discretion determine and to sign the deed of sale and at all such other documents as may be required to give effect to registration of transfer of (the

property).”

[16] Both the principal debtor and the respondent failed to discharge their indebtedness to the appellant in terms of the agreement. Demand notwithstanding, payment was not forthcoming from the principal debtor or the respondent. It is not in dispute that the respondent advised the appellant’s attorneys that she was not in a position to pay the arrear amounts. Consequently, and by virtue of the special power of attorney, the appellant mandated Shoursion Trading Auctioneers to sell the property. The property was thereupon sold to a certain Marcelle Manson.

[17] In the wake of the sale, the respondent resorted to the court a quo seeking an order declaring the sale of the property unlawful, as also an interdict restraining the appellant’s attorneys of record[11] from transferring the property to Marcelle Manson.[12]

[18] The respondent founded her cause of action on the contention that the impugned sale had not been preceded by due process of law. In particular, she alleged that no fresh summons had been issued and thus no order had been obtained declaring the property executable.

[19] The appellant, on the other hand, contended in opposition, that there was no need to issue fresh summons and obtain a court order declaring the property executable in circumstances where the respondent had freely and voluntarily registered a bond over the property in favour of the appellant and signed a power of attorney authorising the appellant, in its discretion, to sell the property by private treaty in the event of the principal debtor and the respondent failing to discharge their indebtedness towards the appellant.

[20] Deciding in the appellant’s favour, the court a quo granted an order that “[t]he application is allowed with costs” on the footing that the impugned sale had not been preceded by due process of law. The relevant part of the impugned judgment reads:

“[11] What comes to the fore from these judgments[13] is that they enhance the rule against self-help, an integral part of the rule of law upon which our democratic order is based. It has been argued on behalf of the respondent that it was acting in accordance with the power of attorneys that had been signed by the applicant, which authorised the 1st respondent in its discretion to dispose of the property without further notice to the applicant. This effectively allowed the respondent to bypass the court, sell the property in execution on its own authority thus taking the law in its own possession and serving as a judge in its own cause. This is precisely what the court in the Lesapo matter sought to and did outlaw.”

- [21] This conclusion was clearly incorrect. The court a quo did not deal with the agreement to pay in the context of the factual matrix of the matter. The background facts were clearly eschewed, and the agreement considered in isolation.
- [22] Underpinning the agreement to pay was the surety bond, clause 37 of which gave the appellant the right to have the property declared executable “in the event of the [respondent’s] failure to discharge any obligation or liability to the [appellant] on the due date thereof...”[14]
- [23] According to counsel for the appellant, Mr Quinlan, clauses such as clause 37 are common in commercial transactions such as the instant one; no contention to the contrary was advanced on behalf of the respondent. The point therefore needs no belabouring.
- [24] It is clear from the background presented above that after the respondent had defaulted, summons which sought, inter alia, to declare the property executable were issued; that constituted due process of law in accordance with which the respondent was availed the opportunity to seek the court’s assistance to protect her interests. She spurned that opportunity.
- [25] The respondent instead opted for an out of court settlement whereby she voluntarily concluded the agreement to pay the debt and sign the power of attorney in terms of which she voluntarily agreed that the appellant could sell the property, in the event of her once again being in default. Contending otherwise would be to render nugatory the principle pacta sunt servanda. I interpose here to mention that none of the debts owed by the respondent prior to the conclusion of the agreement was novated. Clause 7 of the agreement brooks of no interpretation to the contrary, and says it all.
- [26] There was a failed attempt on the part of Mr Vutula, the respondent’s attorney, to suggest that in the absence of proof of proper service of the summons on the respondent,[15] the due process of law had not been set in motion and that, therefore, the sale by private treaty had amounted to self-help. Mr

Vutula was hard put to explain what had triggered the conclusion of the agreement to pay debt other than it having been pursuant to the

respondent's receipt of the summons. It is clear from a reading of the agreement itself that the summons was, at all relevant times, within the contemplation of the parties when they concluded the agreement. This is evidenced, for instance, by the reference in clause 8 to "further legal action" and to the appellant being entitled to apply for default judgment (as against reference to institution of legal proceedings) against the respondent in the event of her failing to implement "the terms of [the] agreement." [16] In any event, during the proceedings before the court a quo the respondent did not deny, in her replying affidavit, the allegation made in the appellant's answering affidavit that the summons had been served on her.

[27] In these circumstances, it is hard to fathom how the court a quo arrived at the conclusion it did namely, that the sale of the property by private treaty had been without due process. Moreover

and in any event, and purely for the sake of completeness, it is trite that a parate executie, which authorises execution without an order of court, is valid, provided it does not prejudice, or is unlikely to prejudice, the rights of the debtor unduly. [17] Also, a parate executie is not per se unconstitutional or offensive to public policy. [18]

[28] The reliance by the court a quo on *Chief Lesapo v Northwest Agricultural Bank* [19] was obviously misplaced. In that case section 38(2) of the Northwest Agricultural Bank Act 14 of 1981 expressly provided for the Bank to sell the debtor's property without recourse to the law. The section was declared unconstitutional as, inter alia, depriving the debtor her or his right of access to courts by allowing the Bank to resort to self-help, by circumventing the courts in enforcing its claim, instead of utilising normal court procedures. That is not the case in *hoc casu*, where the respondent voluntarily waived her right of access to court and instead elected to voluntarily entitle the appellant to sell the property by private treaty in the event of default. The respondent defaulted. As a matter of trite law, nothing prevented the respondent, after the default, to grant the appellant the necessary authority to sell the property. [20]

[29] It was further argued, on behalf of the respondent, that a proper reading of clauses 8 and 12 of the agreement made it incumbent on the appellant to issue summons before selling the property by private treaty. That cannot be so. Clause 8 merely gives the appellant the right to proceed "with further legal action without further notice to the [respondent]", and clause 12 confers the right to apply for default judgment and to seek an order declaring the property executable. None of these clauses imposes a duty on the part of the appellant to take these courses. The discretion to either resort to court once again or to sell by private treaty remained unfettered; the authority granted to the appellant to sell the property by private treaty also conferred by the agreement and the relevant special power of attorney are not negated by clauses 8 and 12.

[30] Here is the conclusion of the matter. Upon the principal debtor and the respondent being indebted to the appellant and not liquidating such indebtedness the appellant instituted an action before the court a quo seeking, inter alia, an order declaring the property executable.

In that way, the respondent's right to access to courts and entitlement to solicit the court's assistance was given effect to. The respondent elected not to avail herself of such assistance, but instead consented to the appellant selling the property when she was in default of paying in terms of the agreement to pay debt. In these circumstances, the sale was lawful, having been consented to by the respondent. The court a quo was misguided in deciding to the contrary.

[31] My attention was drawn to the fact that, in merely granting an order that "the application is allowed with costs", the court a quo did not take into account the costs that had previously been reserved when the matter had served before it, but ended up being postponed with costs being reserved. The parties were ad idem that such costs should follow the result. That is indeed the proper course to follow.

[32] For the above reasons-

- (a) The appeal succeeds, with costs.
- (b) The order of the court a quo is set aside and substituted with one dismissing the application with costs, including all reserved costs.

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

I agree:

J M ROBERSON

JUDGE OF THE HIGH COURT

R B TOKOTA

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Mthatha

C/o Caps Pangwa & Co.

Date heard

: 04 February 2019

Date delivered

: 26 February 2019

- [1] Parate executie or immediate execution occurs where “a creditor has the right to sell the property of a debtor in satisfaction of a debt [without recourse to the courts].” (See *De Beer v Keyser and Others* 2002 (1) SA 827, para [26])
- [2] Per Conjwa AJ (as she then was).
- [3] The principal debtor.
- [4] The property.
- [5] In simple terms, it means the address one elects for the purpose of receiving all legal notices and processes.
- [6] The address of the property.
- [7] The summons was not part of the appeal record, but was, at the instance of the court, handed up from the Bar by consent, it being common cause that this set of summons had been duly issued.
- [8] Act 108 of 1996.
- [9] Clause 1.4.2 of the agreement
- [10] 21 August 2012
- [11] Cited in those proceedings as the third respondent
- [12] Cited in those proceedings as the fourth respondent
- [13] For its conclusion the court a quo relied principally on *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).
- [14] See para [4] above
- [15] In the light of section 26(1) of the Constitution as read with sections 129 and 130 of the National Credit Act 34 of 2005 it has become a requirement in foreclosure cases to require creditors desirous of declaring immovable property executable to satisfy the court that the summons was brought to the attention of the debtor. Cf *ABSA Bank Ltd v Lekuku* (32700/2013) [2014] ZAGPJHC 244 (14 October 2014).

[16] Clause 12

[17] SASFIN (Pty) Ltd v Beukes 1989 (1) SA 1 at 14 D-F; Cf Eastwood v Shepstone 1902 TS 294 at 302, where it was held: “Now this court has the power to treat as void and to refuse in any way to recognize the contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not its actually proved result.”

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[18] SA Bank of Athens Ltd v Van Zyl (431/2003) [2005] ZASCA 2; [2006] 1 All SA 118 (SCA) (21 February 2005)

[19] 2000 (1) SA 409 (CC)

[20] See Bock v Duburo Investments (Pty) Ltd 2004(2) SA 242 (SCA) at 247, para [7], where the court held that “after default the mortgagor may grant the bond holder the necessary authority to realise the bonded property.” (See also Juglal v Shoprite Checkers (Pty) Ltd 2004 (5) SA 248 (SCA) at 260, para [25] and Iscor Housing Utility Co. v The Chief Registrar of Deeds and Another 1971

(1) SA 613 (T) 616

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