

SOUTH AFRICA / JUDGMENT

Exclusive Access Trading 73 (Pty) Ltd v Bouwer and Another (3829/2009) [2011] ZAECHGHC 6 (1 March 2011)

[2011] ZAECHGHC 6

COURT

Eastern Cape High Court, Grahamstown

BEFORE

E Revelas

CASE / FILE NUMBER

3829/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE HIGH COURT – GRAHAMSTOWN)

CASE NO: 3829/2009

DATE HEARD: 28/02/2011

DATE DELIVERED: 01/03/2011

In

the matter between:

EXCLUSIVE ACCESS TRADING 73 (PTY)

LTDAPPLICANT

and

LYNNE JANET BOUWER

.....1ST

RESPONDENT

SHERIFF, HIGH COURT, EAST LONDON

.....2ND

RESPONDENT

JUDGMENT**REVELAS J**

This was an urgent application for an order setting aside an attachment effected by the first respondent on 27 October 2010 in terms of Rule 45 (8) (c) of the Uniform Rules of Court. The object of the attachment was the applicant's incorporeal right, title and interest in respect of its claim against five defendants of whom one is the first respondent. In addition, the applicant also sought a stay of the sale in execution pursuant to the attachment in question, pending the finalisation of its action against the five defendants mentioned above. Ancillary relief was also sought in the form of a declaration to the effect that the first respondents claim has been set off against the amount claimed by the applicant in its action against her and the four other defendants.

The applicant's action against the five defendants (including the first respondent) was based on a loan agreement entered into between the applicant and the Hendrick Bouwer Family Trust. ("The Trust") Hendrick Bouwer and the First Respondent bound themselves as surety and co-principal debtors with the Trust for repayment of the loan of indebtedness and the interest on the capital amount. The loan was for R550 000.00. It is common cause that to date only the sum of R320 000.00 has been paid to the applicant in respect of the loan agreement. It is in dispute whether the payment was towards the capital or towards the interest thereon.

The applicant then instituted action against the first respondent in her capacity as trustee of the trust and in her personal capacity. She is cited as the second and fifth defendant respectively; Hendrick Bouwer was cited in his capacity as trustee of the Trust and in his personal capacity. He was cited as the first and fourth defendant respectively. The third defendant is the other trustee of the Trust. The amount claimed by the applicant is R3 305 116.23, which comprises the actual capital loan amount advanced (R550 000.00) and the interest accrued thereon. The payments made to the applicant, in the amount of R320 000.00 are accounted for in the amount claimed. The loan agreement was concluded on 14 April

2008. Summons was issued, and a subsequent default judgment obtained by the applicant was rescinded.

The first respondent thereafter successfully resisted a sequestration application brought by the applicant in this Court. Part of the costs awarded to her were covered in terms of the bond of security which the applicant was obliged to file in support of its sequestration application. The unpaid balance of the taxed party and party costs came to R24 973.83 plus interest.

The applicant is of the view that the costs of the unsuccessful sequestration application should be set off against its own unpaid claim against the first respondent, since both are for liquidated amounts. It argued that the amount owed by the first respondent is so far in excess of what it owed the first respondent, that it would be inequitable to permit the sale in execution to proceed.

On the other hand, the first respondent has a court order in her favour in terms whereof the applicant is ordered to pay her costs. Non-compliance of court orders could amount to contempt of court, and court orders are hardly obtained with the view not to execute upon them. The first respondent is entitled to satisfaction in terms of the order.

In Wille, Principles of South African Law, 8th Edition 483, the requirements for set off are as follows:

‘The four conditions for set-off to operate are that both debts must be (i) of the same value, (ii) Liquidated, (iii) fully due, and (iv) payable by and to the same persons in the same capacity.’

(emphasis added)

See also: LAWSA Volume 19 page 255, paragraph 255 (a) – (d).

At page 484 of Wille, the author states that no set off takes place where one, if not both, of the debts is unliquidated in the sense that they are not capable of speedy and easy proof (See also: LAWSA Volume 19 paragraph 255 (d)). It is not in dispute that the interest on the actual amount advanced in terms of the loan has more than trebled, and there are questions to be resolved about the application of the in duplum rule, which I do not need to resolve in this application, but it tends to support the proposition that the applicant’s claim against the first respondent is not for a liquidated amount. The in duplum rule means in general terms that a creditor is not entitled to claim unpaid interest in excess of capital outstanding. However, it has also been held a creditor is not prevented by the rule from collecting more than the unpaid capital amount in interest, provided that he at no time allows the unpaid arrear interest to reach that unpaid capital amount. The purpose of the rule is to protect borrowers from exploitation who allow interest to accumulate and to motivate plaintiffs to expedite claiming payment. (See: LTA Construction Bpk v Administrateur Transvaal [1991] ZASCA 147; 1992 (1) SA 473 (A); Standard Bank of South Africa v Oneanate Investments (Pty) Ltd (In Liquidation) [1997] ZASCA 94; 1998 (1) SA 811 (SCA) and Margo v Gardner 2010 (6) SA 385). The parties are also not ad idem as to whether the amounts or what portion of them, already paid to the applicant, was in respect of the capital amount or in respect of interest. Clearly the amount owed on the loan is not liquidated. Accordingly, the two amounts claimed are not capable of being set off against each other.

The applicant raised a second objection to the sale in execution, namely that the attachment of the incorporeal right was invalid and void ab initio for a lack of compliance with the provisions of Rule 48 (8) (c) which reads as follows:

“In the case of attachment of all incorporeal property or incorporeal rights in property as aforesaid,

The attachment shall only be complete when –

notice of the attachment has been given in writing by the Sheriff to all interested parties, and where the assets consist of incorporeal immovable property or an incorporeal right in immovable property, notice shall also be given to the registrar of deeds in whose deeds registry the property or right is registered, and

the Sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have certified that he has been unable, despite diligent search, to obtain possession of the writing or document.”

The sale in execution was not proceeded with when the second respondent (the Sheriff for East London) first advertised it, because it transpired that the Sheriff had not taken possession of the “the writing or document evidencing the ownership of such property or right” as envisaged in the Rule 48 (5) (c) quoted above. The “writing” or the “document” referred to, is of course in this case, the summons and its annexures, which are the copies of the loan agreement and the deed of suretyship. The second respondent also did not certify that he had been unable, despite a diligent search, to obtain possession of such document. As a result the sale was not proceeded with at the time. These failures, according to the applicant, vitiated the entire attachment process.

The summons and its supporting annexures were subsequently handed to the second respondent by the first respondent's attorneys of record, and the sale was re-advertised. The applicant argued that this belated handing over of the documents did not cure the defect and that a new attachment notice should have been issued. It was submitted that because Rule 48 (5) envisages a complete process before a sale in execution can be proceeded with, and in this case the procedure was incomplete, and therefore void. The belated possession of the summons could not resuscitate the process of attachment, according to the applicant.

This argument is, with respect, somewhat artificial. The purpose of taking possession of the document is to prove the existence of the incorporeal right. If for instance, the incorporeal right is a vested interest in a will, then it would be imperative that the will itself should be taken in possession by the Sheriff. In the case of a summons and its annexures being attached, it must be remembered that they are public documents which were issued by the Registrar. In this case the parties to the summons and the attachment are no strangers to each other. The dispute which gave rise to the summons is ultimately the same dispute which developed into the litigation (the sequestration application) in which the first respondent was awarded costs, which is now sought to be enforced by the first respondent. That document (summons) was in any event in possession of the Court. Copies thereof were already

with the applicant, the defendants and their attorneys. Moreover, the applicant's complaint is that he has not been shown a document which emanated from the applicant itself in the first place. The applicant should not be permitted to benefit from the second respondent's oversight. The prejudice sought to be avoided by obliging the sheriff to take possession of the documents or “writing”, was not suffered in this case by the omission to take possession thereof. Therefore the omission was not fatal to the sale in execution in these circumstances, especially since the Sheriff completed the process by taking, albeit later, the summons into his possession.

Should the applicant wish to avoid the sale in execution it should simply comply with the court order and pay the amount of legal costs still outstanding as per the taxing master's allocatur and interest thereon.

In the result, the application must fail, and is therefore dismissed with costs.

E. REVELAS

JUDGE OF THE HIGH COURT

APPEARANCES:

For Applicant: Adv Dugmore, instructed by Netteltons , Grahamstown.

For 1st Repondent: Adv S Cole, instructed by Wheeldon, Rushmere & Cole, Grahamstown.

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