

SOUTH AFRICA / JUDGMENT

Farmsecure v Strauss (4994/2013) [2014] ZAFSHC 56 (25 April 2014)

[2014] ZAFSHC 56

COURT

Free State High Court, Bloemfontein

BEFORE

Moloi

CASE / FILE NUMBER

4994/2013

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

CASE NO. : 4994/2013

In the application between:-

FARMSECURE Applicant

and

ERNST HENDRIK STRAUSS Respondent

JUDGMENT

BY: MOLOI, J

HEARD ON:

17 APRIL 2014

DELIVERED ON: 25 APRIL 2014

- [1] In this application the applicant sought judgment for payment of an amount of R 272,120.20 together with interest a tempore morae from date of judgment and perfection of a notarial covering bond to enable it to take possession of the respondent's moveable goods as security for payment together with ancillary relief as set out in the notice of motion. The respondent opposed the granting of the relief sought.

- [2] It is common cause between the parties that on 4 November 2010 the respondent gave to the applicant a 'Special and General notarial bond' a copy of which was attached to the founding affidavit as well as an acknowledgment of debt. The applicant, in addition, attached to the founding affidavit a certificate of balance outstanding as provided for in the notarial covering bond referred to above. It was also common cause that the applicant complied with section 129 of the National Credit Act No. 34 of 2005.
- [3] The terms of the notarial covering bond were fully set out in the founding affidavit and the following appeared to be in dispute from the respondent's answering affidavit: firstly, the authority of the deponent of the founding affidavit with whom the respondent never had dealings much as he was the applicant's commercial attorney and had insight into the applicant's accounts and satisfied himself of the facts deposed to; he also had an intimate knowledge of the applicant's business activities. It must be stated that this question was not argued during the hearing and can be regarded as admitted. Secondly the applicant had changed its name a number of times and thus the legal personality was put to question. This point was also not pursued as the certificates of incorporation attached proved the corporate identity of the applicant satisfactorily.
- [4] The real argument advanced by the respondent was that the goods sought to be attached by the applicant had the value of approximately R 800 000.00 and it would consequently be unjustified that those goods be attached for an alleged debt of only R 272,120.20. In argument Mr de Wet, on behalf of the respondent, referred to the decision of Wright, J in the matter of *Standard Bank van Suid-Afrika Bpk v Calitz* delivered on 13 April 2000 (unreported) in Application No. 575/2000. In paragraph 6 thereof Wright, J said:

“ ‘n Wesenlike aspek wat onmiddellik vermelding verdien, is die feit dat regshulp van drakoniese aard, naamlik beslaglegging van al die roerende bates van respondent, aangevra is...” and continues at paragraph 11 as follows: “Andersins kan dit tot gevolg hê dat die verbandgewer se hele boerdery of besigheid tot in einde gebring word vir die beveiliging van slegs ‘n geringe skuld.”

In my view the court shall have failed to deliver justice if such a draconian order is made in the circumstances of this case. The court has, however, a discretion to order partial perfection of the notarial covering bond to secure the amount owing, if proven: See *Barclays National Bank Ltd and Another v Natal Fire Extinguishers Manufacturing Co. (Pty) Ltd and Others*, 1982

- (4) SA 650 (D) at 654-655 and *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd and Another*, 1983 (1) SA 79 (C) at 84.
- [5] Mr. de Wet argued further that for the applicant to succeed and get a judgment for the amount of R 272,120.20 claimed as balance outstanding, it must prove that the amount is owing and that the amount is due and payable. The same would be required for the perfection of the notarial covering bond. As the application sought is a final relief it was a pre-requisite that the applicant prove a “clear right” which must be proved clearly on the balance of probability: *Welkom Bottling Co (Pty) Ltd v Becfast Mineral Waters (OVS) (Pty) Ltd*, 1967 (3) SA 45 (O) at 56. See also *Tavern Drankwinkel (Edms) Bpk v Munisipaliteit van*

Stellenbosch, 1985 (4) SA 892 (C) at 901 A-B. In this case the applicant relied on a certificate of indebtedness to prove the respondent's liability to him based on the provisions of Clause 12 of the notarial bond which provides as follows:

"12. 'n Sertifikaat deur die verbandhouer of enige bestuurder, sekretaris, rekenmeester of ander behoorlik gevolmagtigde beampte of agent van die verbandhouer onderteken, is afdoende bewys vir doeleindes van voorlopige of summiere vonnis of enige ander regs middel van

12.1 enige bedrag aan finansieringskoste in verrekening gebring asook die finansieringskoste koers soos van tyd tot tyd deur die verbandhouer vasgestel, en

12.2 die bedrag onder hierdie verband verskuldig."

[6] In Ex parte Minister of Justice in re Nedbank Ltd v Abstein Distributors (Pty) Ltd & Others and Donnelly v Barclays National Bank Ltd, 1995 (3) SA 1 (AD) at 22 C-D the Appeal Court held as follows:

"A conclusive proof clause (it is a clause providing for a certificate of balance to constitute proof of indebtedness) in favour of the creditor in an agreement in terms whereof the creditor is to be the author of the certificate of balance issued under such clause is contra bonos mores and therefore void, regardless of the contents of the agreement in which it finds itself."

The applicant sought judgment against the respondent by way of application. The only basis for proving his claim was the certificate of indebtedness. Such certificate, as shown above, is invalid and cannot substantiate the claim. The claim, consequently, remains unproved. There is no onus on the respondent to rebut the claim. There should have been proof, at least prima facie, for the respondent to be called upon to say something. The applicant cannot, therefore, expect that judgment be given in his favour. The same goes for the perfection of the notarial bond. Such perfection can only be granted if the indebtedness of the respondent was proven. The applicant chose to approach the court by way of application as against the issue of summons where he would be allowed to adduce even evidence viva voce to prove his claim. The applicant made its bed and must lie in it.

[7] As a result the following orders are made:

- (a) The application is dismissed;
- (b) The applicant is ordered to pay the costs;

K. J MOLOI , J

On behalf of the applicant:

Adv. JG GILLILAND

Instructed by:

LOVIUS BLOCK

BLOEMFONTEIN

On behalf of the first respondent: Adv. PJT DE WET

SYMINGTON & DE KOK

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