

SOUTH AFRICA / JUDGMENT

Knipe and Others v Nedbank Limited and Another (59395/16) [2017] ZAGPPHC 1074 (18 September 2017) [2017] ZAGPPHC 1074

COURT

North Gauteng High Court, Pretoria

BEFORE

P M Mabuse

CASE / FILE NUMBER

59395/16

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 59395/16
DATE: 18
September 2017
ROBERT
PETRUS JANSEN KNIPE
1st Applicant
SENEGAL
NR 1 (PTY) LTD
2nd Applicant
SENEGAL
OOS (PTY) LTD
3rd Applicant
SENEGAL WES (PTY)
LTD
4th
Applicant
V
NEDBANK
LIMITED
1st
Respondent
THE
SHERIFF,
VRYBURG
2nd
Respondent

JUDGMENT

MABUSE J:

- [1] This matter came before the Court as an urgent application launched in terms of Rule 6(12) of the uniform rules of Court. Although it was opposed by the respondent on the basis that it was not urgent, the Court ruled that it was urgent and that it had to deal with it on that basis. This ruling by the Court was based on the fact that auction sale of certain immovable properties, which were the subject matter of the application, was scheduled for Friday, 5 August
2016. This application is designed to obtain an order whose fundamental purpose was to stop the auction sale or to suspend it pending an adjudication of certain issues by the Court. I dismissed the application without giving reasons but promised that reasons would follow. These are therefore the reasons.
- [2] This application was characterised by non-compliance with the Practice Directive and the Rules of this Court. It was launched on 28 July 2016 to be heard on 2 August 2016 at 10h00. It is to be noted that the Court roll for 2 August 2016 had closed at 12h00 on 28 July 2016. The respondents were required, in terms of the notice of motion, to notify the applicant's attorneys on or before 28 July 2016 at 16h30 of their intention to oppose the application. The time at which the papers were served on the first respondent was not clear. It was clear though that the said notice of intention to oppose was served only on 29 July 2016. It is imperative for attorneys to act strictly in terms of the Practice Directive. Any deviation from the Practice Directive should be fully explained in order to be justified. Attorneys should be discouraged from doing as they please when they deal with applications in terms of Rule 6(12). Finally, the notice of motion had not been signed by an attorney as required by the Rules of this Court. No explanation was forthcoming as to the failure of an attorney to sign the notice of motion. This in my view showed neglect on the part of the attorney who, when he applied for his admission, told the Court that he had acquainted himself or herself with the Rules of this Court.
- [3] The first applicant in this matter is a major male who resides on the farm Senegal 92 Registration Division JN in the province of Northwest. In this matter the first applicant acted in his personal capacity and also in his capacity as the representative of the second, third and fourth applicants. The second, third and fourth applicants were all companies registered as such in terms of the company statutes of this country. Their registered office was located at 1247 Justice Mohammed Street, Menlopark in the city of Pretoria. The first respondent is described in the notice of motion as a public company that conducted business as a commercial bank with its principal place of business at Aramist Street and Constellation Street, Waterkloof Glen, also in the city of Pretoria. The second respondent is the sheriff of Vryburg of 8 Fincham Street, Vryburg. The first applicant resides on the properties which were the subject of the auction sale and are located within the area of

jurisdiction of the second respondent.

[4] The purpose of this application was to forestall an auction sale of Farm 92

Registration Division JN, Northwest Province, measuring 371 ,3677 hectares, held by Deed of Transfer number T001300/1970, hereinafter

referred to as ("the property") which was scheduled for 5 August 2016 at 10h00, pending an application the first applicant

intended launching for rescission or setting aside of the settlement agreement, a copy of which the first applicant had annexed to the founding affidavit as annexure 'F'.

[5] The first applicant testified that because of the famine in the Northwest Province, he depleted his overdraft facility in account number 1036593827 held at Nedbank in order to purchase additional fodder for the game, cattle and goats on his farm. He needed even more money to enable him to continue farming. For this reason he approached the first respondent for additional overdraft facilities. He was told that all his bank accounts would have to be restructured. For the purposes of restructuring his accounts, he was presented, presumable by the first respondent, with a document titled 1'Deed of Settlement"

which he was asked to sign. He contended furthermore that at that time, as there was no pending litigation and no litigation was about to be launched, he found it difficult to comprehend the title of the documents. It was explained to him that he would not get any additional funds if he did not sign the said document. He did not read the document before signing it but nevertheless he signed it as he had been so requested.

[6] He was told furthermore that the agreement served as proof of the repayment of the accounts and that he would be reminded by the responsible banker when the payments were due. Despite the fact that no responsible

banker ever reminded him about payments which were due, he, on his own free volition, and as and when he could, made payments which

payments were accepted. He claimed that he neither receive any telephone call nor any letter from the first respondent. He testified

that he made payments when he was asked to do so and that such payments were reflected in Annexure 'G' to his founding affidavit.

Exhibit 'G' showed that he made the first payment on 11 October 2013 of R50,000.00 and the last payment was made on 14 March 2016 of R560,947. 2. All his payments as set out in annexure 'G' totalled R3,761,547.00. Apart from these payments in annexure 'G', he made further payments of R83,143.00 into account 60808200203 on 10 March 2016 as shown in annexure 'L', another payment in the sum of R342,106.14 on 14 March 2016 into account 608004001 as indicated in annexure 'M'.

[7] On 13 March 2016, he received an email from one Siphosethu Ngcobo. This email, a copy whereof is attached to his founding affidavit as annexure 'N', read as follows:

"Kindly find attached copy of statement after the settlement of capital portion of debt. The remaining amount is interest of R837,467.56. As discussed we are willing to give a discount settlement for the interest portion herein. We can settle on R410,000.00 (approximately half) in full and final settlement of this account.

Please advise if this is acceptable to you.

Regards

Siphosethu Ngcobo."

The first applicant accepted the above proposal and even called Siphosethu Ngcobo on the cellular phone to confirm his acceptance of the proposal.

[8] To his astonishment on 1 July 2016 he received an email written by the aforementioned Siphosethu Ngcobo which informed him that the shareholder's concerns must be put before him. The said email, a copy whereof was not attached to the founding affidavit but in respect of which the first applicant had promised that it would be made available at the hearing of the application, read as follows:

"Good day Mr. Knipe

Your accounts held with Nedbank refer.

Kindly find attached copies of the latter's statements obtained.

Please know that an executive decision was made to proceed to not only attach the property held under Nedbond Agreement 60800140001, but to also obtain an execution sale date. This decision was taken because the last payment received on any of the accounts was in March 2016 and a proper settlement proposal (with actual dates and amounts) was never given/obtained

This account has been within this legal space for a period of over two years and we cannot continue in the way that we have been.

We have seniors and shareholders to answer to and we are not able to justify the reason for this group not being executed against.

I have received notice that execution sale is set for the 5th of August and can only advise that should you be able to offer settlement or a bank guarantee for settlement of all the accounts prior to this date, then the auction can be cancelled. This decision was unfortunately out of my hands and came from above.

Please note that further arrangements/communications must now be with our attorneys, Mr. Stephan Swart of Baloyi Swart and Associates, contact number. 0861298007.

Siphosethu Ngcobo.

Recovery Manager / Recovery centre: Pretoria / Nedbank Ltd"

The value of the immovable property referred to in the abovementioned had been established, according to Myburg L Valcap Professional Property Valuers, at R26,500,000.00.

[10] On 22 July 2016 at approximately 16h00 he received a telephone call from someone who called himself Andi. This Andi asked him if he was aware of something in the Government Gazette. That Andi told him that his property would be sold. He suggested to him that he should drive through to pick up a copy of the notice presumably at his place at 841 French Street,

Moreleta Park. He took the notice to his attorneys on Tuesday 26 July 2016 who attended with haste to drawing his application.

[11] The first applicant now submits that:

- (1) the document titled settlement is unlawful and void because it was used to deprive him and his children of a homestead;
- (2) that the same document did not comply with the provisions of the National Credit Act 34 of 2005 inasmuch as the first respondent did not comply with the provisions of s 129(1)(a) of the NCA.

[12] The first respondent contended, on the other hand, that the deed of settlement, which was a document the first applicant called "settlement", was properly made an order of Court on or about 10 June 2015; that it constituted a consent judgment which accorded the first respondent the right to execute on the properties. The first respondent

submitted that, in the circumstances there was no basis either in fact or in law to rescind or set aside the judgment which was based on the settlement agreement. Secondly, it is so contended on behalf of the first respondent, that as late as 1 July 2016, the first applicant attempted to stop the pending auction of the relevant property by offering to pay to the first respondent a sum of R1,5 million and furthermore by settling the outstanding amounts by the end of September 2016. The offer that the first respondent made in the aforesaid manner was accepted by the said Siphosethu Ngcobo on behalf of the first respondent and the acceptance of the said offer was communicated to the first applicant. Despite the communication of the said offer to him, the first applicant failed to comply with his offer in that he failed to pay the said amount of R1,5 million.

[13] According to the first respondent, the first applicant held certain accounts with it. He fell into arrears with his obligations in terms of such accounts. As a compromise of his indebtedness, the settlement agreement was reached. The remaining applicants bound themselves as sureties for the first applicant's debt as set forth in the settlement agreement. The respondents duly applied to Court to have the settlement agreement made an order of Court and that order the first respondent

obtained on 10 June 2015.

[14] The first applicant did not challenge the fact that he had signed the settlement agreement. He did not complain that he was not given an opportunity to read the settlement agreement. While he testified that he did not peruse the

settlement agreement, he failed to furnish reasons why he did not read it. He failed to give valid reasons why he intended launching an application to set it aside. It was difficult to see how he would succeed because paragraph 4.5 of the said agreement stated expressly that:

"The parties specifically record that they are desirous that this agreement should be made an order of Court and that Nedbank may, in its sole direction, at any stage apply to Court for the agreement to be made an order of Court, without notice to the first applicant. "

[15] When the first applicant agreed, as he contended, to sign the agreement, it must be assumed that he was prepared to accept the terms thereof. It meant he assumed that, according to him, the settlement agreement was good in all material respects and seriously and deliberately entered into it. The conduct of the first applicant in signing the settlement agreement, unless he can prove that his signature was induced by operative mistake, or by fraud, and this is not his case, binds him fully. If that were not so, it is difficult to see how commerce could proceed at all. All kinds of mental reservations, of careless unilateral mistakes, of unexpressed conditions and the like would become relevant and no party to any contract would be safe. The door would be open to uncertainty and even to fraud. The conduct of the first applicant in signing the settlement agreement must, in terms of the law, be consistent only with the intention to be bound by the terms of such an agreement. The conclusion that the first applicant intended to be bound must not only be reasonable but must be a necessary inference from his conduct. The test is whether a reasonable man, knowing all the facts, would deliberately refrain from acquainting himself with the contents of a document but sign it. I found nothing in the founding affidavit which would support any ground for the first applicant's contemplated step to apply for rescission of the settlement agreement. He had very little prospects to succeed with such an application and accordingly on this case the application could not succeed.

[16] The first applicant contended furthermore that the first respondent failed to comply with the provisions of s 129 of the NCA. He submits that the first defendant should not have commenced litigation before he had served him with a notice in terms of s 129. There is, for the following two reasons, no merit in this argument. Firstly, a court order is not a credit agreement. Section 129(1) provides that:

"... if a consumer is in default under a credit agreement, the credit provider may ..."

It was clear therefore that the court order that the first respondent obtained on 15 June 2015 was not a credit agreement. In this regard the court was referred by counsel for the first respondent to a paragraph in the *Standard Bank Ltd v Roberts and Another* (2013) ZA WHCH 25 where the Court had the following to say:

"(16) The defendant's first defence is that the plaintiff had not comply with the National Credit Act 34 of 20(15 {NGA) because he had not received the section 129 notification letter, as originally alleged in his answering affidavit in opposition to the plaintiff's summary Judgment; Jnt application launched prior to the conclusion of the deed of settlement. In my view, the defence is devoid of merits because the plaintiff alleged non-compliance with the NGA had become moot. Given that the dispute in summary judgment procedure had become settled in terms of the deed of settlement agreement that was made an order of Court.

(17) Mr. Cutler, appearing for the defendants, submitted that a settlement agreement is an "incidental credit agreement" as defined in s 1 of the NGA and therefore the agreement has to comply with the procedure as stipulated in the NGA. I am in agreement with the submission made by Mr. Olivier, on behalf of the plaintiff, that a settlement agreement cannot be defined as an incidental agreement because no "account was tendered for goods and services" as defined in section 1.

(18) Another reason why, to my mind, this contention does not stand up to scrutiny is because the deed of settlement agreement was made an order of Court and a Court order can, by definition, be defined as a credit agreement (See Investec Mauritius (Ltd) v Leo Gerard Mohan, case number 6713/2010, unreported judgment)."

[17] Secondly, the first respondent did not commence any litigation. The first step that the first respondent took was simply to obtain the court order to confirm the settlement agreement. Section 130 of the NCA was not applicable in this case. On this point the applicants have no prospect of success in their contemplated application to set aside the judgment.

[18] In the premises I was not satisfied that the applicants had made out a good case for the relief that they sought.

[19] Accordingly the application was dismissed with costs.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:

Adv. RF de Villiers

Instructed by:

Zietsman Horn Attorneys

c/o Nel van der Merwe & Smalman Ing.

Counsel for the respondent:

Adv. M Riley

Instructed by:

Baloyi Swart & Associates Inc

Date Heard:

4 August 2016

Date of

Judgment:

18 September 2017

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