

SOUTH AFRICA / JUDGMENT

Ramanamane v SB Guarantee (RF) (Pty) Ltd (52853/21) [2023] ZAGPJHC 592 (29 May 2023) [2023] ZAGPJHC 592

COURT

South Gauteng High Court, Johannesburg

BEFORE

Van Aswegen

CASE / FILE NUMBER

52853/21

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 52853/21

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

29.05.23

In the matter between:

EDWIN THABO RAMANAMANE APPLICANT and SB GUARANTEE COMPANY (RF) PTY LTD
RESPONDENT

NEUTRAL CITATION: Ramanamane v Sb Guarantee (Case No: 52853/2021)

[2023] ZAGPJHC 592 (29 May 2023)

JUDGMENT: LEAVE TO APPEAL

VAN ASWEGEN AJ

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 29 May 2023 and is handed down electronically by circulation to the parties/their legal representatives by e mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16h00 on 29 May 2023

INTRODUCTION:

1. This is an application where the Applicant seeks leave to appeal against the dismissal of the rescission application in respect of the foreclosure order and certain ancillary relief. The ancillary relief being:
 - 1.1 a declaratory order declaring that the respondent breached the terms of the settlement agreement;
 - 1.2 a declaratory order that the respondent is liable for all accumulated arrears, repayments, interests, and legal costs since the conclusion of the settlement agreement;
 - 1.3 an order to compel the respondent to engage with the applicant on his business plan for the rezoning, subdivision, and development of the property; and
- an order that, if the parties are unable to reach an agreement within six months, that either party may approach the Randburg Magistrate's Court.

ARGUMENTS RAISED DURING HEARING:**A. THE APPLICANT'S ARGUMENT:**

2. The Applicant appeared in person and argued that the court had erred in finding that Rule 42 of the Uniform Rules of Court was not applicable to the matter. He indicated that the Settlement Agreement entered into between himself and the Respondent was unfair and completed under duress. The settlement was agreed upon between the parties on Friday the 13th of November 2020 and was only seen by him on the Monday morning – the 16th of November 2020. This follows being contacted by the Respondent's attorneys on the Saturday evening (14 November 2020) in order to confirm the draft order. The Respondent's attorney stated that confirmation of the draft order was needed as soon as possible, as same was to be made an order of Court the following Monday morning (16 November 2020), The Applicant informed the Court that he only checked his e-mails on the Monday morning at 05:00. He was happy with the draft order and sent an e-mail to that effect to the Respondent's attorneys on the Monday morning the 16th of November 2020.
3. The Applicant informed the court that he had proposed a six month payment of R15 000.00 on 9 October 2020 to the Respondent. There were discussions between the parties about what the agreement should contain up to Friday 13 November 2020.
4. According to the Applicant there was a big difference between what was discussed between the parties and the settlement agreement. A period of six (6) months was allowed to also consider the Respondent's Easy Sell programme.
5. The Applicant could not get onto the teams platform on Monday the 16th of November 2020.

6. The Applicant advised that an order would not have been granted if he had appeared on Monday the 16th of November 2020. It was not the Applicant's fault that he could not access the teams link.
7. The three options available to consider for a possible payment arrangement put forward by the Respondent on 21 October 2020[1] were the following:

"1. You are required to pay the minimum lump-sum of 50% of the arrear amount immediately, being R440 000.00 (rounded) to stop the legal action. Then, the balance of the arrears must be paid within 3-6 months (R104 000.00) for six months - this amount includes your normal instalment).
2. If you cannot pay the balance off over the 6-month period, then the Bank requires the following documents to have an alternative arrangement reviewed:
 - Proof of income - salary slip, copy of the lease agreement (rental income), maintenance, etc.
 - Letter with the reason for not maintaining monthly payments and proposal.
 - Breakdown of Monthly expenses.
 - List of all debt, monthly repayment amount and outstanding balance.
 - If you do not bank with Standard Bank, 3-month bank statements; and Municipality: utility bill. - If in arrears, please provide proof of a payment arrangement.
3. In the alternative to the above, if you cannot afford the property and wishes to sell it, the bank has an Easy sell programme: should you be interested in selling the property, I annex hereto the Mandate with Information regarding the Easy sell programme as well as the bank's brochure explaining in detail."
8. The Applicant said that the unfairness lies in the fact that the Respondent in an e-mail dated 21 October 2020[2] accepted the six month suspension period upon the condition that the Applicant consented to the monetary judgment being granted against him, with costs, together with an order declaring his immovable property specially executable.
9. The Applicant stated that he was coerced into signing the settlement agreement. If he did not do so, there would have been foreclosure of the immovable property.
10. The Applicant also argued that his proposal – business plan was never considered by the Respondent. It was he said in his interest that the Respondent engaged with him in respect of his business plan.
11. During the six month suspension period the Applicant said that he had discussions with the Respondent.
12. The Respondent e-mailed the Applicant on 5 January 2021 and followed it up on 10 January 2021. It was only on 5 February 2021 that the Applicant insisted that he needed a decision on his business plan. The Applicant sent the documents to the Respondent again to peruse.

13. Only at the end of March – 16 March 2021 did the Respondent indicate that it did not approve the business plan.
14. The Respondent's emails were all merely, the Applicant said, to delay the process.
15. The Applicant insists that he wants the Respondent to engage with him and do a proper assessment.

B. THE RESPONDENT'S ARGUMENT:

16. Advocate Bruinders argued that the Applicant had two core complaints:

16.1 that the Settlement Agreement was invalid and

16.2 that the Applicant's business plan amounted to a defence to the main action.

INVALIDITY OF SETTLEMENT AGREEMENT:

17. The Applicant entered into a settlement agreement with the Respondent, which agreement was made an order of court. The court order can only be rescinded on those grounds recognised in our law. The rescission must be approached from the direction of the judgment and not the agreement. The judgment is res judicata and precludes a claim based on the agreement. Until the judgment has been set aside there can be no question of attacking the settlement

agreement.

18. The Applicant can therefore only rescind the settlement agreement in terms of Uniform Rule 42, Rule 31 or the common law.
19. Rule 42 is not applicable, Advocate Bruinders argued, because this is not a default judgment as it was an opposed matter that was settled between the parties. There was accordingly opposition.

BUSINESSPLAN

20. The common law is also not applicable, the Respondent's advocate argued, because then the business plan must be an alternative to foreclosure. The business plan must therefore amount to a payment alternative to satisfy the judgment debt.
21. The business plan is however merely a plan and it cannot be implemented.
22. On the Respondent's behalf it was argued that orders cannot be rescinded with business plans.
23. The Applicant furthermore did not bring the business plan to fruition. There was no cession of the loan – all that exists is a plan. A bank cannot merely demolish homes which secures its indebtedness.

24. The Applicant consented in definite terms to the settlement agreement which does not even refer to the business plan.
25. The Applicant was e-mailed the settlement agreement on the Thursday, 12 November
2020. The Applicant responded by seeking amendments which were effected on Friday 13 November 2020. The settlement agreement was signed on the same Friday. On Monday morning, the 16th of November 2020, the Applicant consented to the draft order being made an order of Court. Subsequently, Advocate Bruinders argued, the Applicant must have developed “buyer’s remorse”.
26. If, it was argued, the whole settlement agreement was about the said business plan the agreement would surely have made mention of the business plan once.
27. The Applicant consented in no uncertain terms to the suspension of the executability for a period of six months to pay the Applicant’s arrears.
28. The Applicant also did not during the six (6) month period approach the Respondent to consider the Easy- Sale Programme – in order to find another solution for his indebtedness. It is important to note that the Applicant also did not make payment of the R10 000.00 as per the agreement on a monthly basis. The Applicant accordingly has been living cost free in the immovable property since 2021 and provides no explanation therefore.
29. The question is simply. What is the Applicant’s defence? Either the Applicant has a defence or he has to pay the cash.
30. Advocate Bruinders concluded by stating that there were no grounds for appeal.

CONSIDERATION OF AFORESAID ARGUMENTS:

31. In order to assess the settlement agreement it is of the utmost importance to have regard to the e-mail correspondence between the Applicant and the Respondent. The e-mail correspondence trail sketches a true and accurate picture of the events leading to the settlement agreement being made an order of Court.
32. The Applicant was informed by the Respondent’s attorneys of three possible settlement options with the Respondent on 7 October 2020. Option one contemplated payment of the arrears within six months.[3]
33. On 9 October 2020 the Applicant responded by suggesting payment of R15 000.00 per month for a period of six months, after which he would pay the full outstanding arrears.[4]
34. There was conditional acceptance of the Applicant’s request for a six-month suspension period on the 21st of October 2020. The Applicant consented to:
 - i) monetary judgment being granted against him, with costs together with an order declaring the immovable property specially executable and

ii) that if he accepted the offer and failed to pay the arrears and the Respondent's costs, that the Respondent will proceed to have the property sold at a sale in execution.[5]

35. On 28 October 2020[6] the Applicant thanked the Respondent for agreeing to the indulgence of six months "to get the house finances in order" and proposed a new arrangement reducing the payments from R15 000.00 per month to R10 000.00 per month. It is of the utmost importance to note that the Applicant recorded the following:

"We also understand that acceptance of the offer by the Bank is subject to us 'consenting to the monetary judgment being granted

against us, with costs together with an order declaring the property as specially executable."[7]

36. The Respondent's attorneys on Monday the 9th of November 2020 sought confirmation that the Applicant's revised offer was the following:

36.1 the Applicant will sign a settlement agreement in which he consents to monetary judgment with an order to declare the immovable property specially executable;

36.2 the Applicant will pay R10 000.00 per month;

36.3 the order will be suspended for a period of six months for the Applicant to settle the arrears; and

36.4 the Applicant will be able to use the Easy sell programme during the six month suspension period should the need arise.[8]

37. On Tuesday, 10 November 2020, the Applicant stated:

"I confirm the offer as outlined below in para (sic) 4."[9]

38. On Thursday, 12 November 2020 at 13:33 the Respondent's attorney e-mailed the Applicant a settlement agreement for consideration and signature.[10]

39. At 08:03 on Friday 13 November 2020[11] the Applicant responded by attaching a marked-up version of the agreement and said:

"please check document for requested changes/comments on asterixed pages, edit and revert."

40. On Friday, 13 November 2020 at 09:37[12], the Respondent's attorney returned the amended settlement agreement in accordance with the Applicant's changes and comments and requested that the Applicant sign the agreement and return the signed version to the Respondent's attorney for transmission to the bank.[13]

41. The Applicant subsequently at 10:00 on Friday, 13 November 2020[14], requested another amendment to the agreement. The Applicant wanted to make his first payment of R10 000.00 at the end of December 2020 and for the six month suspension period to commence from the end of December 2020.

42. At 11:09 on Friday, 13 November 2020, the Applicant impressed on the Respondent's attorney to inform the bank that:
- "the reason for six months is to find a financial resolution to my position, not to stay [at] a cheap rental for the next six months.[15]"*
43. The Respondent's attorneys accepted the start date proposed by the Applicant for the first payment under the agreement at 11:40 on 13 November 2020.
44. The Applicant at 11:40 on Friday, 13 November 2020, confirmed that he signed the settlement agreement and attached it to the e-mail.
45. On Saturday, 14 November 2020, the Respondent's attorneys sent a draft order to the Applicant for hearing on Monday, 16 November 2020, which merely gave effect to the terms of the settlement agreement and made it an order of court.[16]
46. On Monday, 16 November 2020, the Applicant responded to the e-mail of 14 November 2020 transmitting the draft order. The Applicant said:
- "I have read the draft order and hereby confirm my consent." [17]*
47. From the trail of correspondence it is abundantly clear that the Applicant knew - since October 2020 - that the settlement agreement was contingent upon his consent to monetary judgment and an order declaring the immovable property executable.
48. On 10 November 2020, in expressing an appreciation of the terms of the settlement negotiations, the Applicant made a proposal that included consent to judgment and an order for executability suspended for six months with an interim payment of R10 000.00 per month and the arrear balance due on the expiry of the six month suspension period.
49. In considering the abovesaid trail of correspondence it is abundantly clear that the Applicant actively participated in the settlement negotiations, made proposals and secured amendments to the settlement agreement in his favour. The Applicant agreed to and signed the settlement agreement on Friday, the 13th of November 2020, after the Respondent's attorneys effected two amendments at his instance. The Applicant's contention that he was coerced into signing the settlement agreement cannot hold muster in light of the Applicant's active participation in securing a settlement agreement which favoured him.
50. It is also vital to note that the settlement agreement included clause 2.1[18] when the Applicant signed the said agreement on Friday, 13 November 2020. This specific clause remained unchallenged by the Applicant at the time. This clause is however irrelevant to the rescission application and only a recognition of the Applicant's consent to judgment and the executability order.

51. It is of great significance to take cognisance of the fact that the purpose of the settlement agreement is best explained by the Applicant in an e-mail at 11:09 to the Respondent's attorneys where the Applicant impressed that the said attorneys inform the bank that, "the reason for six months is to find a financial resolution to my position, not to stay [at] a cheap rental for the next six months." [19]
52. During the trail of e-mail correspondence referred to herein before, there was no discussions between the Applicant and the Respondent regarding the development of the property. The Applicant at no point in time during the interactive negotiations to secure a settlement agreement mentioned or insisted on a condition relating to the business plan. To the contrary the settlement agreement is entirely silent on the business plan.
53. I am of the firm opinion that the objective evidence before the court dictates against a finding that the settlement agreement is invalid. The reasons advanced for the invalidity of the settlement agreement are not substantiated by the evidence in the papers.
54. A court can furthermore also not rescind the court order due to the invalidity of the settlement agreement. The Court can only rescind a court order – in this instance the settlement agreement which was made an order of Court - in terms of either Rule 31(2)(b), Rule 42 or the common law. Unless the judgment of Court is set aside the validity of the settlement agreement cannot be attacked. [20]
55. The Applicant in the evidence before Court did not disclose a bona fide defence to the main action. The existence of the Applicant's business plan is not a bona fide defence to the main action. The business plan cannot satisfy the judgment debt - as it is merely a plan.
56. The Applicant did not provide any evidence that the business plan is in the process of being implemented.
57. The Applicant during the six month suspension period did not make any payment towards his arrears, despite agreeing thereto. The arrears have accordingly increased instead of decreased.
58. The Applicant has not made out a case for rescission, save to attempt to impugn the settlement agreement. There is no objective evidence for the Applicant's attack of the settlement agreement. On the one hand the Applicant wants to dispute the settlement agreement, but on the other he chooses to place reliance on the very same agreement for the enforcement of the business plan. This can simply not be done.
59. Having considered the arguments on behalf of both parties and what is stated here in before I cannot find that there is a reasonable prospect of success on appeal and that another court will come to another finding.
60. Accordingly, I make the following order:
 - 60.1 The application for leave to appeal is dismissed with costs.

VAN ASWEGEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Heard on: 28 April 2023

Judgement delivered on: 29 May 2023

APPEARANCES:

FOR THE APPELLANT: IN PERSON FOR THE RESPONDENT: ADV VS BRUINDERS INSTRUCTED
BY PAGDENS ATTORNEYS

[1] 008-47

[2] 008-46.

[3] 008-52

[4] 008-51

[5] 008-45 and 008-46

[6] 008-44.

[7] Paragraph 10 008-46

[8] SBG 5.5 at 015-6

[9] SBG5.6 at 015-7.

[10] SBG 5.7 at 015-8;

[11] SBG 5.8 at 015-9.

[12] SBG 5.9 at 015-10.

[13] 015-10

[14] SBG 5.11 at 015-12

[15] SBG 5.13 at 015-14;

[16] SBG 5.21 at 015-22.

[17] SBG 5.22 at 015-23

[18] 001-10

[19] SBG 5.13 at 015-14;

[20] Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd 2017 (5) SA 508 (SCA)

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