

SOUTH AFRICA / JUDGMENT

Silver Solutions 1206 CC v Oosthuizen and Others; Quick Leap Investments 438 (Pty) Ltd v Silver Solutions 1206 CC and Others (M 491/2019; KPM 113/2018) [2021] ZANWHC 85 (25 November 2021) [2021] ZANWHC 85

COURT

North West High Court, Mafikeng

BEFORE

A.M. Mtembu

CASE / FILE NUMBER

M 491/2019; KPM 113/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

Case

No.: M 491/2019

Reportable:

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES/ NO

In

the matter between:

SILVER
SOLUTIONS 1206 CC
Applicant
And
JOHANNES
PETRUS OOSTHUIZEN
First Respondent
JUAN
ADRIAAN OOSTHUIZEN
Second Respondent
QUICK
LEAP INVESTMENTS 438 (PTY) LTD
Third Respondent
Case
No.: KPM 113/2018
QUICK
LEAP INVESTMENTS 438 (PTY) LTD
Applicant
and
SILVER
SOLUTIONS 1206
CC
First Respondent
THE
SHERIFF OF THE HIGH COURT, MAHIKENG
Second Respondent
ABSA
BANK
Third Respondent
Heard
: 03 September 2021
Delivered
: This judgment is handed down electronically by
circulation to the parties through their legal representatives'
email addresses.
The date for the hand-down is deemed to be 15
November 2021.
ORDER
WHEREFORE,

the following order is made:

- (i)
Quick Leap is not in breach of clause 2.1 of the settlement agreement in respect of July 2019 instalment.
- (ii)
The writ of execution and the attachment thereon are set aside.
- (iii)
Quick Leap is in breach of clause 2.1 of the settlement agreement in respect of August 2019 instalment and subsequent instalments.
- (iv)
The first and second respondents jointly and severally, one paying the other to be absolved, and jointly and severally with the third respondent, are ordered to pay the amount of R600 000,00 (Six Hundred Thousand Rand) to the applicant, with interest at the rate of 10.25% per annum, calculated from 8 August 2019 to date of final payment, interest to be compounded monthly.
- (v)
No order as to costs.

JUDGMENT

MTEMBU AJ

INTRODUCTION

[1] The genesis of this application stems from the contractual dispute regarding the acceleration clause of the settlement agreement. The applicant (“Silver Solutions”) under case number M491/2019 seeks an order against the respondents that they must pay an amount of R600,000.00 with interest at the rate of 10.25% per annum, calculated from 07 August 2019 to 8 August 2019 and further interest at the same rate on the amount of R600,00,00 from 08 August 2019 to date of final payment. The application is opposed. The respondents contend that the application must be dismissed. Before me, are two applications. This first application is the one that I have already adumbrated above. The second application under case number KPM113/2018 concerns a rescission of the writ of execution granted on 24 July 2019, and the attachment that followed the writ. These two applications were consolidated as per Court order dated 13 February

2020. For ease of reference, parties will be referred to as cited under case number M491/2019.

THE

FACTS

- [2] On 29 July 2015, Silver Solutions and Quick Leap Investments 438 (Pty) Ltd (“Quick Leap”) entered into a building contract in terms of which Silver Solutions undertook to construct two residential dwellings for Quick Leap on a property situated in Potchefstroom. In the year 2016, the parties engaged in a contractual dispute. The contractual dispute ended in arbitration proceedings and subsequently a settlement agreement was reached on 03 September 2018. The settlement agreement is the subject matter of these proceedings before me.
- [3] In terms of the settlement agreement, the first and second respondents bound themselves jointly and severally as sureties and co-principal debtors to Silver Solutions for the due and timeous fulfilment of all the financial obligations towards Silver Solutions by Quick Leap arising out of the settlement agreement.
- [4] The most relevant clauses of the settlement agreement are the following:

Clause 2.1

“Defendant shall in addition to the invested amount and interest thereon pay the amount of R100 000 (One Million Rand) to the Claimant in 20 (twenty) equal instalments of R50 000 (Fifty Thousand Rand) each to the Claimant, the first payment to be made on 07 December 2018 and monthly thereafter on or before the 7th (seventh) day of each and every following month until the said amount of R1 000 000 (One Million Rand) has been paid in full.”

Clause 2.2

“Should the Defendant fail to pay any of these instalments or fail to make instalment on the due date or pays a lesser amount than R50 000 (Fifty Thousand Rand) per month, the unpaid balance of this amount of R 1 000 000 (One Million Rand) shall immediately become due and payable and the outstanding amount will then bear interest at the maximum permissible interest rate calculated from the date of the default to date of final payment, to be compounded monthly. A certificate issued by the Claimant’s accountant or auditor, whose appointment need not be proven, shall be prima facie evidence of the amount outstanding in terms of this agreement.”

- [5] The settlement agreement was made an award on 25 October 2018 by the arbitrator. The award was subsequently made an order of Court. On 06 December 2018, the parties agreed that all payments to be made in terms of settlement agreement would be paid into the trust account of the applicant’s attorneys, Geert Lampen Attorneys.
- [6] Quick Leap made various monthly instalments in terms of clause 2.1 of the settlement agreement for the months of December 2018 until June 2019. The outstanding balance then amounted to R650 000.00.

- [7] Quick Leap effected an electronic transfer on 06 July 2019 at 10:30. The 6th of July 2019 was a Saturday. The 7th of July 2019 was a Sunday, and the 8th of July 2019 was a Monday. The amount of R50 000 electronically transferred on the 6th of July 2019 reflected on the applicant's chosen account on the 8th of July 2019.
- [8] Silver Solutions contended that Quick Leap failed to pay the instalment of R50,000,00 for the month of July 2019 on or before the due date, namely 07 July 2019, and that in terms of clause 2.2 of the settlement agreement, the full outstanding balance plus interest thereon was due and payable. Silver Solutions contended that payment by electronic transfer only occurs when the party entitled to payment receives such payment in its bank account. The payment was therefore late, since it was received on 08 July 2019.
- [9] Consequently, Silver Solutions issued a writ of execution against Quick Leap on 24 July 2019. In August 2019, the Sheriff executed the writ and attached Quick Leap's bank account. Aggrieved with the writ of execution, on 22 August 2019, Quick Leap made an application for setting aside the writ of execution under case number KPM113/2018.
- [10] Silver Solutions also contended that Quick Leap further failed to pay monthly instalments after the 8th of July 2019. Mr Grundlingh, appearing on behalf of the applicant, contended that even in the event that I find that payment was made timeously in terms of the settlement agreement, it is common cause that no further instalments were made. As a result, Silver Solutions is still entitled to the balance of R600,000,00 plus interest thereon as per clause 2.2 of the settlement agreement.
- [11] On the other hand, Quick Leap contended that it made payment of R50,000,00 timeously on 6 July
2018. Quick Leap further contended that the attachment of its bank account by the Silver Solutions was the cause of failure to make subsequent payments after July 2019. It also contended that the enforcement of the acceleration clause was contra bonos mores.
- [12] I therefore have to determine whether payment was timeously made by Quick Leap; whether the enforcement of acceleration clause was against public policy, contra bonos mores and against the spirit of good faith; and whether performance in terms of the settlement agreement was made impossible by virtue of attachment. I am also required to determine the setting aside of the writ of execution application brought by Quick Leap.

TIMEOUS PAYMENT

- [13] Payment is a bilateral act which, in the absence of contrary agreement, requires the cooperation of debtor and creditor. For effective

payment to occur the payee must in the absence of contrary agreement acquire 'the unfettered or unrestricted right to the immediate use of the funds in question', otherwise the payment is inchoate. See *Vereins-Und Westbank AG v Veren Investments and Others*.^[1]

[14] The SCA in Vereins-Und Westbank[2], had regard to the following:

“Though the general rule is that the means of payment must be determined by agreement between the payer and payee, it is clear that unilateral conduct on the part of the debtor in purporting to effect payment, if subsequently accepted by the creditor, is effective to discharge the debt. Thus should the debtor unilaterally pay a stranger to the contract, if the creditor later ratifies and approves the action, this constitutes a valid payment, and is considered valid from the moment of payment (and not from the moment of ratification and approval.”

[15] If a party accepted the credit to its account as a payment to it, the fact that the funds were not placed at its disposal cannot prevent a payment from being effected. The subsequent approval is effective to validate the payment from the time when it was originally made, even though the payee did not have access to it.[3]

[16] Mr Grundlingh contended that payment by electronic transfer can only occur when the party entitled to receive such payment receives it in his bank account. I was referred to these cases: *Bush and others v BJ Kruger Incorporated and another* [2013] JOL 30001 (GSJ); and *Gariep Municipality v Nucon Roads & Civil (Pty) Ltd* 2012 JDR 2529 (FB). These two judgments deal with the issue of jurisdiction. The question in these judgments was whether payment occurs at the place where electronic transfer occurred or where the money was received. The proposition these cases illustrate is that receipt of money by the creditor constitute payment. Mr Grundlingh therefore contended that Quick Leap is in breach of the settlement

agreement in that it failed to make payment for July on or before 7 July 2019.

[17] The facts of the above authorities are distinguishable from the present facts. In this matter, it is common cause that the settlement agreement does not specify the manner and place of payment, and Quick Leap made various payments by means of electronic transfer, the conduct of which was accepted by Silver Solutions. Silver Solutions accepted the credit, 08 July 2019 instalment, to its account as a payment to it. The approval of this payment by Silver Solutions validates any method Quick Leap may unilaterally have chosen to effect the discharge, even if that method failed to place the performance at the immediate disposal of Silver Solutions. If a party accepted the credit to its account as a payment to it, the fact that the funds were not placed at its disposal cannot prevent a payment from being effected. The subsequent approval is effective to validate the payment from the time when it was originally made, even though the payee did not have access to it.[4] Silver Solutions cannot approbate and reprobate. The moment it accepted the credit resulting from an electronic transfer of 6 July

2019 as a debt-discharging transaction on 8 July 2019, it cannot later reprobate. Therefore, in my view, the approbation by Silver

Solutions had a retrospective effect. According to the rule *ratihabitio mandato comparatur*, the payment is regarded as valid from the time of making it.

[18] For the reasons stated above, Quick Leap is not in breach of clause 2.1 of the settlement agreement in respect of instalment of July 2019.

[19] Even if I am wrong, I agree with Mr du Plessis, appearing on behalf of the respondents, that the enforcement of the acceleration clause by Silver Solutions is against public policy, *contra bonos mores*, against the spirit of good faith and unfair. Both parties are in agreement that the existence and the wording of the acceleration

clause is not *contra bonos mores*. The issue in dispute is the manner in which it was invoked. It is common cause that Quick Leap effected an electronic transfer on 06 July 2019, it was a Saturday. 07 July 2019 was a Sunday. I apply judicial notice that the payment could not reflect in the applicant's chosen account because it was a weekend. It is conspicuously clear that the intention of Quick Leap was to honour the settlement agreement on or before the 7th of the month. It cannot be compatible with public policy that a technical or slight delay of reflection of payment in a bank account would attract the full might of clause 2.2 of the settlement agreement so that the applicant gains massive commercial advantage to the significant

disadvantage of respondent. The application of the acceleration clause under these circumstances would be against public policy. Davis J in *Combined Developers v Arun Holdings & Two Others*[5] with reference to *Jugdal v Shoprite Checkers (Pty) Ltd*[6], held that, "a contractual provision may not itself run counter to public policy but that the implementation may be so objectionable that it is sufficiently oppressive, unconscionable or immoral to constitute a breach of public policy, in which case public policy can be invoked in justification of a refusal to enforce a provision."

IMPOSSIBILITY OF PERFORMANCE BY QUICK LEAP

[20] It is common cause that the Quick Leap's bank account was attached. Quick Leap therefore contended that the consequent attachment of its bank account made it impossible for it to make monthly payments in terms of clause 2.1 of the settlement agreement, as it was not having access to its account. Mr du Plessis, on behalf of the respondents, submitted from the bar, that the bank account had an overdraft facility. The overdraft facility got frozen when the account was attached.

[21] On the other hand, Silver Solutions contended that upon attachment of Quick Leap's bank account, no funds were found in the Quick Leap's bank account by the Sheriff. During argument, it was common cause that Quick Leap's bank account had no funds available, as from 2nd of August 2019. Mr Grundlingh submitted that it was not the respondents' case that besides the attached account, Quick Leap had no access to alternative funds or sources of income to have paid the August 2019 instalment. The alleged inability to make the subsequent monthly payments does not amount to impossibility of performance. Silver Solutions contended that failure to pay the August 2019 and subsequent instalments constitutes further breaches of clause 2.2 of the settlement agreement. The impossibility was self-created.

- [22] I agree with Mr Grundlingh that the respondents failed to make out a case for their defence that besides the attached account, Quick Leap had no access to alternative funds or sources of income to have paid the August 2019 instalment. There is no sufficient explanation provided as to why Quick Leap failed to honour its obligations for the month of August 2019 and for the subsequent months. I am not persuaded that the attachment caused impossibility of performance. Worse, even the bank account relied upon had no funds to satisfy the judgment debt either in whole or in part.
- [23] Of significance, in terms of clause 3 of the settlement agreement, the first and second respondents bound themselves as sureties and co-principal debtors to Silver Solutions for the due and timeous fulfilment of all the financial obligations of Quick Leap towards Silver Solutions arising out of settlement agreement.
- [24] The undertaking of the surety is accessory to the main contract. It is an undertaking that the obligation of the principal debtor will be discharged, and if not, that the creditor will be indemnified. See *Liberty Group Limited v Illman*[7]
- [25] In *Van Zyl v Auto Commodities (Pty) Ltd*[8], the SCA had regard to the following:
- “A contract of suretyship is distinct from the contract or contracts between the principal debtor and the creditor that gives rise to the principal indebtedness, but it is accessory to that contractual relationship and the principal debtor’s obligations under it. Subject to any specific limitation, such as a suretyship in a limited amount, the surety’s obligations are coterminous with those of the principal debtor. Where the surety signs as co-principal debtor, as Mr Van Zyl did, the addition of those words show that the surety is assuming the same obligations as the principal debtor. In other words, the obligation of the surety is the same as that of the principal debtor. It follows from the accessory nature of the surety’s undertaking that the liability of the surety is dependent on the obligations of the principal debtor.” [My Emphasis]*
- [26] SCOTT JA in *Jans v Nedcor Bank Ltd*[9] referred and considered the following legal position in *Union Government v Van der Merwe* 1921 TPD 318.
- “The legal scope of the surety’s contract is identical with that of the principal debtor – accessorium sui principalis naturam sequitur. The surety undertakes the same obligation as the debtor, and undertakes to perform this same obligation so soon as the debtor, when called upon, fails to perform it.”*
- [27] On a proper interpretation of clause 3 of the settlement agreement with reference to the authorities referred to above, it is glaring that the first and second respondents undertook to perform the same obligation as Quick Leap and undertook to perform same obligation as soon as Quick Leap fails to perform. Meaning that the first and second respondents had an obligation to honour the August 2019 instalment as well as the subsequent instalments as soon as Quick Leap failed to do so. By its very nature a contract of suretyship is burdensome. The surety undertakes responsibility for the fulfilment of another’s obligation. The typical surety in modern society is one who binds him- or herself as co-principal debtor and guarantees the debts of a company or close corporation which has little in the way of share

capital or assets but is dependent on credit in order to conduct its business.[10]

[28] It is trite that the impossibility must be absolute or objective as opposed to relative or subjective. Subjective impossibility to receive or to make performance does not terminate the contract or extinguish the obligation. See *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd*.^[11] Meaning that there must have been literally no possible way for the party to perform its duties. If the only way to perform would be to go extreme hardship or expense, it is still possible, and therefore that party is not excused. In *Scoin Trading (Pty) Ltd v Bernstein NO 2011 (2) SA 118 (SCA)*, para 22, the SCA held that, “The law does not regard mere personal incapability to perform as constituting impossibility.”

[29] For the reasons stated above, the defence of impossibility of performance must fail.

WRIT OF EXECUTION

[30] I have already found that Quick Leap is not in breach of clause 2.1 of the settlement agreement in respect of instalment of July 2019, therefore, it becomes axiomatic that the setting aside of the writ of execution application must succeed. The writ of execution was primarily based on the non-payment of July 2019 instalment, which I have found not to be the case.

[31] What remains is the question of costs. The general rule is that costs must follow the result. Silver Solutions contended that the respondents must be ordered to pay costs of the main application under case number M491/2019 on an attorney and own client scale. Similarly, the respondents contended that Silver Solutions must pay costs on an attorney and own client scale. In my view, both parties were partially successful to a certain extent. I have no reason why there should payment of costs by any party

[32] WHEREFORE, the following order is made:

(i) Quick Leap is not in breach of clause 2.1 of the settlement agreement in respect of July 2019 instalment.

(ii) The writ of execution and the attachment thereon are set aside.

(iii) Quick Leap is in breach of clause 2.1 of the settlement agreement in respect of August 2019 instalment and subsequent instalments.

(iv) The first and second respondents jointly and severally, one paying the other to be absolved, and jointly and severally with the third respondent, are ordered to pay the amount of R600 000,00 (Six Hundred Thousand Rand) to the applicant, with interest at the rate of 10.25% per annum, calculated from 8 August 2019 to date of final payment, interest to be compounded monthly.

(v) No order as to costs.

A.M. MTEMBU

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING

: 03 SEPTEMBER 2021

DATE OF JUDGMENT

: 25 NOVEMBER 2021

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[1] 2002

(4) SA 421 (SCA) at para 11

[2] Ibid at para 12

[3] Ibid at para 13

[4] Ibid at para 13

[5] [2014] JOL 31897 (2015 (3) SA 215) (WCC) at para 36

[6] 2004

(5) SA 248

[7] (1334/2018)

[2020] ZASCA 38 (16 April 2020) at [17]

[8] [2021] 3 All SA 395 (SCA) at para 11

[9] [2003] 2 All SA 11; 2003 (6) 646 (SCA) at para 20

[10] Ibid at para 30

[11] 2000

(4) SA 191 (W), at 198B-C.) see also *Unlocked Properties 4 (Pty) Limited v A Commercial Properties CC* (18549/2015)

[2016] ZAGPJHC 373 (29 July 2016) para 7

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