

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION,  
JOHANNESBURG**

**CASE NO: 28839/2016**

|       |                                  |
|-------|----------------------------------|
| (1)   | REPORTABLE: YES                  |
| (2)   | OF INTEREST TO OTHER JUDGES: YES |
| (3)   | REVISED.                         |
| ..... | .....                            |
| DATE  | SIGNATURE                        |

In the matter between:

**THE TRUSTEES FOR THE TIME BEING OF  
ROSHEN AND KOMARIE FAMILY TRUST &  
3 OTHERS**

Applicant

And

**BUSINESS PARTNERS LIMITED**

Respondent

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**J U D G M E N T**

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**MODIBA J**

## **INTRODUCTION**

[1] This is an opposed application for the rescission of a warrant of execution the Registrar of this court issued on 6 June 2018 ("the warrant of execution"), in favour of the respondent.

## **BACKGROUND FACTS**

[2] On or about 6 September 2016, the applicants and the respondent entered into a settlement agreement which prescribed time periods for payment. In terms of the settlement agreement, the applicants would make payments to the respondent by the 29<sup>th</sup> day of each month and send the proof of payment within a day of such payment. On 10 October 2016, the settlement agreement was made an order of court.

[3] The respondent sought and obtained the warrant of execution on the basis that the applicants breached the parties' settlement agreement. The applicants deny that they breached the settlement agreement. It is on that basis that they seek a rescission of the warrant of execution. The respondent is adamant that the applicant breached the settlement agreement and that it was entitled as it did, to obtain the warrant of execution and to attach movable assets at the applicants' premises.

## THE ISSUES TO BE DECIDED

[4] From the above, it follows that the following issues stand to be decided:

4.1 whether or not the applicants breached the settlement agreement as the respondent alleges;

4.2 whether the applicants make out a case for the warrant of execution to be rescinded.

## THE APPLICABLE LEGAL PRINCIPLES

[5] The legal principles set out below are applicable to the issues that arise between the parties:

5.1 the court may, on good cause shown, set aside a warrant of execution;<sup>1</sup>

5.2 to determine whether a party has shown good cause, the court considers all factors which had a bearing on the issuing of the warrant of execution and effecting the proper administration of justice;<sup>2</sup>

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<sup>1</sup> *Mynhard v Mynhardt* 1986 (1) SA 456 (T) at 463 G; *Chasen v Ritter* 1992 (4) SA 373 (SE) at 328 – 329.

<sup>2</sup> *Madinda v Minister of Safety and Security* 2008(4) SA 312 (SCA)

## APPLICATION OF THE PRINCIPLES TO THE FACTS

[6] Clause 3 of the settlement agreement provides that:

*"In the event of a breach of this agreement, set out below, which is not remedied within 7 (seven) days after the defendants have received notice of the breach, the full outstanding balance for which the plaintiff has issued summons, less any payments received, will immediately become due and payable and the plaintiff will be entitled to proceed with execution steps without further notice to the defendants under the following circumstances ...*

*3.1 If any instalment is not received timeously on the due date thereof. "*

*...*

*3.3 "The defendants are only allowed to breach the agreement on three occasions. Accordingly, the defendants will only receive three notices to remedy a breach. Should a breach occur on a fourth occasion, the plaintiff shall immediately be entitled to proceed with execution steps, i.e. obtaining judgment on the confession to judgment and to proceed with execution steps to sell the immovable properties in execution, without notice to the defendants."*

[7] The interpretation of this clause is not in dispute.

[8] I find that the applicants breached the agreement three times as alleged by the respondent and that under the circumstances, the respondent was entitled to have the warrant of execution issued.

[9] The respondent notified the applicants of the first breach on 9 October 2017, when its attorney of record, Jacobs, delivered a letter informing to the latter's attorney of record, Andraos, that his clients have failed to comply with the prescribed terms of the settlement agreement in that they had failed to make payment for the August instalment timeously and did not send the proof of payment as required. Further, it failed to make the September 2017 payment or if made, to send the relevant proof of payment. Jacobs recorded these breaches to constitute the first breach of the settlement agreement in accordance with clause 3.3. Andraos did not respond to this correspondence.

[10] The respondent notified the applicants of the second breach on 12 December 2017, when Jacobs informed Andraos that his clients were once again in breach in that payments, as per Andraos's email of 1 December 2017, and the proof thereof, were not made on or before the 29<sup>th</sup> day of every month, thereby placing the applicants in breach of the settlement agreement for the second time. Jacobs further reiterated that the first breach was already communicated on 9 October 2017.

[11] On or about 22 May 2018, Jacobs recorded the third breach which demonstrated that the applicants continued to make payments late and still failed to send their proof of payment in accordance with the prescribed terms of the settlement agreement. Jacobs warned the applicants that as a result of their third breach, they were given 7 days to remedy it, failing which the respondent would proceed immediately with legal action. On 4 June 2018, Andraos delivered proof of the applicant's payment. It depicted that all payments that were due for April 2018, were effected later than the monthly due date. Jacob concluded that the applicants

were indeed in breach of the settlement agreement as they failed to remedy their breach within 7 days.

[12] The respondent contends that the third aforesaid breach entitled it to have the warrant of execution issued without further notice to the applicant in terms of clause 3.3 of the settlement agreement.

[13] The applicants do not dispute the instances of breach as contended by the respondent, except the first and the last breach.

[14] They contend that when the respondent notified them of the first breach, their payments were up to date. This does not detract from the fact that they failed to make the relevant payment by the 29<sup>th</sup> and to dispatch the proof of payment within a day as required in terms of the settlement agreement.

[15] They also contend that the respondent failed to send notices of breach to the given email address. This ground of opposition, under the present circumstances is a red-herring. On 6 October 2017, the applicant's attorney informed Jacobs that one Ryan Merrifield was no longer in its employ, and that all future correspondences should be sent to his replacement Andraos. This was done. Jacobs delivered the last letter to the second applicant's email address and copied-in his attorney of record.

[16] At no point did the applicants take issue with the service of notices of breach but proceeded to make payments and to send proof of payments to remedy the breach in all three instances, thereby acknowledging receipt of the respective notices

of breach, despite not having been sent to the given email address. This signifies that the purpose of the notice of breach had been attained. No further purpose would be served under these circumstances to insist that notices ought to have been sent to the applicants.

[17] In respect of the last breach, the applicants also dispute the computation of the 7 days within which they had to remedy the breach, contending that they did so timeously. There is no merit to this contestation. They were given notice on 22 May 2018. They made payment on 31 May 2018 and another on 1 June 2018. The latter payment was made more than 7 court days. They therefore failed to make payment within the required period. Under these circumstances, the respondent was entitled as it did, to proceed to have the warrant issued.

## CONCLUSION

[18] Our courts have consistently upheld the contractual freedom of the parties.<sup>3</sup> Under these circumstances, I find that the respondent was entitled to proceed legally as it did. The applicants have failed to show cause why the warrant of execution ought to be set aside. Therefore the application stands to be dismissed with costs.

## COSTS

[19] The respondent seeks costs *de bonis propriis* against the applicants in their representative capacity. At common law, a party who litigates in a representative

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<sup>3</sup> See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 57

capacity (such as a trustee) cannot be ordered to pay the costs *de bonis propriis* unless he or she has been guilty of improper conduct.<sup>4</sup> It may be also ordered to pay such costs where there is a want of *bona fides* on its part or if it acted with gross negligence.<sup>5</sup>

[20] The respondent makes no case for improper conduct, gross negligence or lack of *bona fides* on the part of the applicants. That the applicants did not retract their prayer for costs *de bonis propriis* against the respondent's attorneys when the respondent demanded that they do so does not entitle the respondent to such costs.

[21] In the premises, the following order issues:

## **ORDER**

1. The application is dismissed with costs.

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**MADAM JUSTICE L T MODIBA  
JUDGE OF THE HIGH COURT,  
GAUTENG LOCAL DIVISION,  
JOHANNESBURG**

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<sup>4</sup> *Cooper NO v First National Bank of South Africa Limited* 2001(3) SA 705 (SCA) at 706 D.

<sup>5</sup> *Blou v Lampert and Chipkin NNO and Others* 1973 (1) SA 1 (A) at 3 F and G.



## **APPEARENCES**

|                                |                           |
|--------------------------------|---------------------------|
| Counsel for applicant:         | Advocate F Saint          |
| Attorney for applicant:        | Morgan Attorneys          |
| Counsel for first respondent:  | Advocate N Alli           |
| Attorney for first respondent: | Mendelow Jacobs Attorneys |
| Date of hearing:               | 28 May 2019               |
| Date of judgment:              | 10 October 2019           |