IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

15/01/2016

CASE NUMBER 33071/2012

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

ABSA BANK LIMITED — PLAINTIFF

And

MOLOKO HECTOR ETSANE — DEFENDANT

JUDGMENT

MAVUNDLA. J,

[1] The plaintiff seeks an order in terms of which the defendant's immovable property Erf 660 Silver Lakes Township Registration Division J.R.; Province of Gauteng; Measuring 1050 (one thousand and fifty) square meters Held by deed of transfer T60806/2006 is declared executable, in terms of Rule 41(4) and 46(1)(a).

[2] It is common cause that on or about 12 November 2007 the defendant passed a first mortgage bond for an amount of R3 300 000.00 together with an additional amount of R66 000. 00 in respect of monies lent and advanced to the defendant pursuant to a loan agreement concluded between both parties, the full terms of which are contained in annexure "A" attached to the plaintiff's summons issued against the defendant.

[3] As security for the loan amounts lent and advanced, the defendant bound as security for the said amounts, his following property: ERF […] Silver lakes Township, Registration Division J. R., Province Gauteng Measuring 1050 (One Thousand and Fifty) Square metres
Held by Deed of Transfer T60806/2006.

[4] It is common cause that the defendant breached the terms of the agreement in that he defaulted in the bond instalment repayment resulting in the amount of R3 274 767. 47 together with interest thereon at the rate of 9.00% per annum capitalized monthly with effect from 20 March 2012 to date of payment becoming due and payable. Consequently the plaintiff issued summons against the defendant for the payment of the aforesaid amount and interest, on 12 June 2012. The summons was served upon the defendant on the 18 June 2012.

[5] The defendant entered an appearance to defend the matter on the 28 June 2012. The plaintiff applied for summary judgment against the defendant, which was heard on the 21 August 2012, resulting the following Court Order "A" court:

1. That leave to defendant the action be granted to the defendant;
2. That the defendant to pay the plaintiff the arrears amount in respect of the current loan agreement within 30 (thirty) days of the plaintiff furnishing the defendant with a certificate of balance, and stamen of account;
3. That the plaintiff to reinstate and activate the loan account so as to enable the defendant to make payment in accordance with prayer 2 (two) here above.
4. That, costs pertaining to the summary judgment application, be costs in

the cause;

5. That, the loan agreement, as per agreement will remain in effect, and will continue on the same basis."

[6] The parties exchanged pleadings and the matter was enrolled for trial on 20 May 2014. On the said date the parties reached an agreement which was made an order of court, a copy of which was attached as annexure "B". According to the plaintiff the defendant failed to comply with the said court order in the following instances:

6.1. failing to pay the instalment as reflected in paragraph 2 of the order, and

6.2. Failing to provide the plaintiff with updated information on his financial position before or on 20 June 2014 as per paragraph 6 of the order.

[7] The plaintiff further contended that in terms of the order, and more specifically paragraph 7 thereof, should the defendant fail to comply with any of his obligations in terms of the agreement or the agreement attached to the plaintiff's summons as annexure "A", the plaintiff will be entitled to apply, upon notice and, on unopposed basis, to have the defendant's immovable property declared specifically executable as prayed for the in the summons.

[8] In opposing the application to have his immovable property declared executable, the defendant contended that the plaintiff caused a constructive breach which goes to the heart of the settlement agreement in that it failed to reinstate and activate the loan account as to enable him to make payment in accordance with prayer 2 of such order; and failed to provide him with access to the account to make payment in accordance with the settlement agreement.

[9] The defendant further contended that the immovable property is his family's primary residence and if decaled executable they will have no accommodation, shelter. His wife is employed and their children go to nearby school as live in a safe environment, a security and convenient location.

[10] It was further submitted on behalf of the defendant that there was a compromise in the form of novation and therefore the plaintiff is not entitled to the order sought but must sue de nova on the compromise. The applicant cannot have the property declared executable in settlement of monetary order. The account which was in progress is subject to a court order that it be reactivated.

There is no verification application and therefore the application must be dismissed with costs.

[11] According to the plaintiff, the defendant failed to comply with a settlement agreement concluded on the 20 May 2014 and made an order of the Court, Annexure "B". The settlement agreement provided that the defendant's transactional account is activated for purposes of the defendant to make payment into the account; the defendant will pay a minimum monthly instalment in the amount of R35 707, 93. 00 from date of settlement until the defendant is no longer in breach (owing less than R3 300 000, 00) where after the agreement will proceed on its pre-default basis. It needs noting that the settlement agreement does not specifically provide how the payment is to be made by the defendant. It however provides, inter alia, that the defendant would provide the plaintiff with updated information on the defendant's financial position on or before 20 June 2014.

[12] According to the plaintiff the defendant failed to provide the plaintiff with update information on the defendant's financial position before 20 June 2014, or at all. According to the plaintiff the defendant had not made a single payment in terms of the settlement agreement, which provided that should defendant fail to comply with the any obligations in terms if the agreement, the plaintiff will be entitled to apply, upon notice on unopposed basis, to have the defendant's immovable specially executable.

[13] The defendant in his opposing the application contended that the plaintiff caused a constructive breach which goes to the heart of the settlement agreement in that it failed to reinstate and activate the loan account as to enable him to make payment in accordance with prayer 2 of such order; and failed to provide him with access to the account to make payment in accordance with the settlement agreement.

[14] The defendant further contended that the immovable property is his family's primary residence and if decaled executable they will have no accommodation, shelter. His wife is employed and their children go to nearby school as live in a safe environment, a security and convenient location.

[15] It was further submitted on behalf of the defendant that there was a compromise in the form of novation and therefore the plaintiff is not entitled to the order sought but must sue de novo on the compromise. The applicant cannot

have the property declared executable in settlement of monetary order. The account which was in progress is subject to a court order that it be reactivated. There is no verification application and therefore the application must be dismissed with costs.

[16] It was submitted on behalf of the plaintiff that the purpose of the settlement agreement is unambiguous and clear. The basic rules of interpreting a judgment or order are no different to those applicable to the construction of other documents. The Court's intention has to be ascertained primarily from the language of the judgment or order, construed according to the well-known cannons of interpretation. In this regard reliance is made on the decisions of *Engelbrecht v Senwes Ltd* 2007 (3) SA 29 (SCA) at 32 and *Firestone SA {PTY) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304. It is further contended that on such a reading of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary qualify or supplement such meaning.

[17] It was further submitted on behalf of the plaintiff that the defendant's requirement and obligation to make payment was not subject to the activation of the transactional account. The defendant's obligation to provide updated financial information is in terms of the original agreement and is not subject to anything. The plaintiff is, so it was contended, is acting in terms of the settlement agreement which provided that should the defendant fail to comply with any of his obligations in terms of the agreement, the plaintiff will be entitled to apply to have the defendant's property declared specially executable.

[18] In Amler's Precedents of Pleadings seventh Edition, page 97 a compromises is defined as a contract which has its object the prevention, avoidance or termination of litigation. It is a substantive contract which exists independently of the cause that gave rise to compromise.

[19] *In casu,* the relied compromise is premised on the agreement reached and made an order of Court on 20 May 2014 marked "X". Of importance is paragraph 7 thereof which reads as follows:

"5

That the defendant be granted to 20 May 2015, to ensure that the Defendant is within the limits provided for by his Private Bank One facility and no longer in breach.

That the defendant in terms if clause 4 of annexure "A" to the plaintiff's summons provide the Plaintiff with updated information on the Defendant's financial position on or before 2-0 June 2014.

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Should the defendant fail to comply with any of his obligations in terms of this agreement or the agreement attached to the plaintiff's summons as Annexure "A" the plaintiff will be entitled to apply, upon notice and, on an unopposed basis, to have the plaintiff's property specially executed as prayed for in the summons."

[20] In the matter of *Chapmans Peak Hotel v South Peninsula Municipality* 1998 (4)ALL SA 619 (C) at 634b-d the Court held as follows:

Botha JA in *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 669H-670A, stated that "the legal consequences of a compromise are the same as *res judicata* and, in the absence of an express or implied term to the contrary, results therein that the original cause of action is extinguished. Miller JA in *Go/loch & Comperts {1967} (Pty) Ltd v Universal Mills & Produce* Co *(Pty) Ltd (supra)* at 922H described a compromise as most closely equivalent to a consent to judgment.

The *onus* of proof is on the party who alleges that a compromises has been reached (see:*Torch Morden Binnehuis Vervaardiging Venn (Edms) Bpk v Husserl* 1946 CPD 548.

The ambit of compromise of issues between the parties to legal proceedings brought on notice of motion, is determined with reference to the affidavits filled by them and crystallised by the relief claimed (see: Horowitz v Brock and others 1988 (2) SA 160 (A) at v179J-180A) as well as the terms of compromise, and whether or not, the compromise results in an order of court, is interpreted in accordance with the general rules applicable to the interpretation of documents (see: *Firestone SA (PTY) Ltd v Gentiruco* AG 1977 (4) SA 298 (A) at 304D-H)."

[21] On perusal of the Court order upon which the alleged compromise is relied upon, in particular paragraph 7 thereof, it is clear that the original causa has not been jettisoned out, so as to debar reliance thereon. If the intention was to exclude the original causa, then there would have been no need to include in the agreement made an order of court the 'breach of any of the defendant's obligations in terms of the agreement attached to the plaintiff's summons as Annexure "A"'. Should the defendant breach any of the aforesaid conditions, the

plaintiff is at large to seek an order to have the defendant's property specially executed as prayed for in the summons. This also makes it abundantly clear that the prayers in the original summons are still alive and therefore making it unnecessary to have summons initiated *de nova.* In my view, the defence of compromise stands therefore to be dismissed. This should be so because the defendant has not specifically denied his indebtedness to the plaintiff, as alleged in its paragraph 4.6. As a matter of fact the defendant admitted that in terms of the agreement, should he fall in arrears with his monthly repayments, the full amount owing and secured under the mortgage bond would immediately become due, owing and payable.

[22] The defendant has further raised as a defence that the relevant property is the domain of both himself and his family. The domain is in proximity to the school attendant by his children and to the work station of his wife. In as much as the applicant has a right to housing, as guaranteed in the Bill of rights in the Constitution, however, such right does not debar a credit provider to exercise his rights to demand payment due to him and even execute and sell the mortgage property. This as much has been recognised in a plethora of authoritative Court decisions. In my view, balancing the respective interest of both parties, and having regard to the fact that the amount is not insubstantial, the dictate of fairness, sway me to find that the interest of the applicant, in the circumstances of the case must yield to that of the applicant. I therefore find that this defence raised does not preclude the applicant in having the relevant property specially executed and sold, if need be, to liquidate the defendant's indebtedness.

[23] With regard to the defence of impossibility to comply with payment, as contended by the defendant, I am not persuaded that there is merit in this regard. The defendant could easily have paid into one or other account to demonstrate his bona fides to comply with the settlement agreement made an order of Court.

[24] In the premises, I find that the applicant has made an unassailable case for the order sought and that the defendant's defences should be dismissed as I do. In the result the following order is made:

1. That the defendant be and is ordered to pay the plaintiff the amount of R3,834,183. 08;
2. That interest on the abovementioned amount at the rate of 9% per annum, calculated and capitalised monthly from 5 May 2014 to date of final

payment, both dates inclusive;

3. That the Defendant be and is ordered to pay all the Plaintiff's costs of the action under case number 33071 / 2012, to be taxed on a scale as between attorney and client;
4. That the Defendant be and is ordered to pay costs of this application to be taxed on a scale as between attorney and client;
5. That the Defendant's following immovable property be and is declared specially executable:
   ERF […] Silver lakes Township,
   Registration Division J . R.,
   Province Gauteng
   Measuring 1050 (One Thousand and Fifty) Square metres
   Held by Deed of Transfer T60806/2006.
6. That the Registrar of this Court be and is authorised to issue a warrant/ s of execution against the Defendant's immovable property, to give effect to order granted in terms hereof.

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N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 04/12/2015
DATE OF JUDGMENT : 15/01/2016
APPLICANTS' ADV : ADV J. S. GRIESEL
INSTRUCTED BY : TIM DU TOIT & INC
RESPONDENTS' ADV : ADV A. P. ELLIS
INSTRUCTED BY: MURPHY KWAPE MARITZ ATTORNEYS