REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT

NOT REPORTABLE

Case no: 2498/2013

In the matter between:

JOHANNES PAUL VAN TELLINGEN APPLICANT

AND

ABSA BANK LTD RESPONDENT

Heard: 14 March 2013
Delivered: 20 March 2013

JUDGMENT

BOQWANA AJ

Introduction

[1] The applicant launched an urgent application before this Court on 20 February 2013 seeking a final order in terms whereof the respondent would be ordered to cancel its mortgage bond B53731/2008 in favour of the respondent, against the registration of transfer of Erf 7778, Constantia, situated at 20 Southern Cross Drive, Constantia, Cape Town.

[2] The application was initially scheduled to be heard on 06 March 2013. The parties however agreed to postpone the matter to 14 March 2013 and for the applicant to deliver its replying papers.

Background Facts

[3] In 2006 the applicant purchased immovable property which was financed by Standard Bank. A mortgage bond in the sum of R 3 300 000.00 was simultaneously registered with the acquisition of the property. In 2008 the respondent offered the applicant a more favourable interest rate. This led to the cancellation of the mortgage bond with Standard Bank and the conclusion of the mortgage loan agreement with the respondent. The cash loan amount for the property was R 3 200 000.00 whilst the mortgage bond was registered for R 4 500.000.00.

[4] The applicant alleges that no monies were advanced to him when the mortgage bond was cancelled with Standard Bank instead the respondent was simply substituted as the new mortgagee of the property. The respondent's response on this issue is that at the time of the registration of the mortgage bond the applicant agreed that the property would serve as security for the payment of the debt for which the applicant stood surety in respect of Telfa - TF Engineering CC ('the CC'). This debt was for an overdraft that the applicant acquired to conduct the business of the CC. This, according to the respondent explains why the mortgage bond was registered for R4.5 million instead of R 3.2 million. The applicant is however adamant that the mortgage bond was registered pursuant to the mortgage loan agreement and the mortgage loan agreement limits the nature and extent of the liability, to those debts described in the loan agreement which do not include any suretyship. The significance of this will become clearer later on in the judgement.

[5] In September 2012 the applicant decided to sell the property in question. He obtained valuations from different estate agents but finally decided to place it on the market for an asking price of R 4 800 000.00. On 19 February 2012 the applicant signed an agreement of sale for the sale of the property with an

entity known as The Antoinette Trust ('the purchaser') at a purchase price of R 4 100 000.00.

[6] The applicant's attorneys, West Rossouw Attorneys ('West Rossouw') thereafter requested the respondent to provide them with the bond cancellation requirements. On 29 November 2012 Smith Tabata Buchanan Boyes attorneys ('STBB'), acting on behalf of the respondent sent an email to West Rossouw with cancellation instructions issued on 27 November 2012, stating that the cancellation figure would be R 3 069 935.93 plus the interest of R 3 015 995.07 at the rate of 6.40%. This was followed by a letter dated 07 December 2012 requiring a bank guarantee, an undertaking for cancellation costs, certified copies of FICA documents and particulars of simultaneous transactions and advice as to which attorneys will be attending to the transactions. In response to this request Investec, the purchaser's banker, issued the requisite guarantee in favour of the respondent on 15 January 2013.

[7] Meanwhile, on 14 December 2012, the respondent issued summons against the applicant for a claim in the amount of R 1 868 006.34 plus interest which was the amount allegedly owed by the CC for which the applicant stood surety. In the summons the respondent alleged that it had registered a covering bond over the immovable property Erf 7778, Constantia as security for amounts owing by the applicant. It also submitted that the right to have the property specifically declared executable was agreed to by the applicant. The issuance of summons was preceded by a letter of demand in terms of section 129 of the National Credit Act sent on 08 December 2012. The letter itself did not mention the suretyship debt as being covered by the mortgage bond but as already mentioned the summons did. The certificate of balance capitalised the amount due and payable as at 02 November 2012 to be R1868 006.34.

[8] The applicant entered appearance to defend the action on 29 January 2013 which led to the respondent applying for summary judgement. The application for summary judgement was refused by Nyman AJ on 05 March 2013 with applicant granted leave to defend the action. Shortly before the handing down

of this judgement (i.e. the very morning my judgement on this urgent application was due to be delivered) I was furnished with a copy of the judgement detailing reasons for orders delivered by Nyman AJ on 19 March 2013 on the summary judgement application brought by the respondent against the applicant. I have briefly considered it and it does not detract from my findings in this matter. Moreover in this matter I am not required to determine the merits of the action.

[9] Returning to the bond cancellation issue. The transaction was approved for registration of transfer by the deed's office and the transaction came up for registration on 06 February 2013. On the same day STBB advised the applicant's attorneys that the respondent was only prepared to cancel the bond upon being furnished with the further guarantee of R 1 881 640.00. The respondent alleges that it made an error in providing cancellation figures. The applicant alleges that he was caught by complete surprise by the turn of these events.

[10] The applicant offered to have an amount of R600 000.00 kept in his attorneys trust account pending resolution of the issue. That offer was rejected by the respondent, with STBB instead advising West Rossouw that the settlement amount would be R1 499 643.00 and would be due on 11 February 2013. The applicant then lodged an urgent application on 20 February 2013 seeking an order compelling the respondent to cancel the mortgage bond.

Evaluation

[11] The applicant seeks a final order. He must therefore establish a clear right, an injury committed or reasonably apprehended and absence of an alternative remedy.[1] Further to that he must show that this application warranted to be heard on an urgent basis.

[1] See Van Loggerenberg et al Erasmus Superior Court Practise Supplementary Volume page E8-6C - D Service 39, 2012

[12] Moreover, the application must be determined in accordance with the much quoted decision of Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[2] where he said the following:

'...where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.[3]

[13] Mr Combrink who appeared on behalf of the applicant submits that the applicant has established a clear right on three grounds. The first ground is that the mortgage bond read with the mortgage loan agreement does not cover the suretyship debt. The second is an alternative argument that in any event the parties have agreed to the amount required for the cancellation of the bond and the third point is that the respondent should in all events be *estopped* from denying the veracity of representations made by the applicant in relation to the cancellation figures which it provided to the applicant.

[14] The applicant relies on a number of clauses in the mortgage loan agreement which he alleges limit the nature and the extent of the security provided by the mortgage bond. One such clause he contends is clause 4.4. This clause defines "covering mortgage bond" as follows:

'..the continuing covering mortgage bond referred to in clause 3.1.1 above, being a mortgage bond (as that term is defined in the deeds Registries Act No.47 of 1937) which secures all amounts lent and advanced by the Borrower or future indebtedness of the Borrower to the Bank under this agreement from time to time notwithstanding the fact that the amount thereof may fluctuate'. ('own emphasis')

[15] The mortgage bond itself, under continuing covering bond, reads as follows:

"This bond shall remain in force as continuing covering security for the capital amount, the interest thereof and the additional amount, notwithstanding any intermediate settlement, and, notwithstanding any intermediate settlement, this bond

---

[2] 1984 (3) SA 623 (A)

[3] *Plascon Evans, supra* at 634 H-I

shall be and remain of full force, virtue and effect as a continuing security and covering bond for each and every sum in which the Mortgagor may now or hereafter become indebted to the Bank from any cause whatsoever to the amount of the capital amount, interest thereon and the additional amount."[4](own emphasis)

[16] The applicant contends that these two clauses are in conflict with each other. According to the applicant the mortgage loan agreement clearly covers the amount loaned only whilst the mortgage bond clause refers to each and every amount owed to the bank. In the result his counsel argues that the mortgage loan agreement must prevail as provided for in clause 29.2 of that agreement.[5]

[17] I disagree with the interpretation adopted by the applicant's counsel in this regard. I am of the view that clause 4.4 includes the current and future indebtedness and does not expressly exclude the suretyship debt. That clause refers to 'all amounts lent and advanced by the Borrower'. This in my view coincides with the mortgage bond clause 4 that refers to 'each and every sum owed to the bank.' The applicant signed suretyship in favour of the respondent on 07 March 2006. The suretyship debt was already in existence at the time the mortgage loan agreement was signed.

[18] I am also not persuaded that the phrase "'under this agreement" limits the extent of the security only to the cash loan amount. This is because the cash loan amount itself is R 3 200 000.00 and the mortgage bond was registered for 4.5 million. In my view, the applicant has not offered any satisfactory explanation as to why the bond would be registered at the higher amount. The respondent's explanation that the reason for registration of the mortgage bond at 4.5 million was to include the suretyship debt is in my view more probable. Furthermore, clause 3.1 of the mortgage loan agreement which the applicant relies on to advance his argument does not support his case. Clause 3.1.1 clearly states that mortgage bond is registered in the amount of R 4 500 000.00. Clause 3.1.2 that applicant's counsel refers to simply relates to

[4] Clause 4 of the Mortgage Bond

[5] Clause 29.2 of the Mortgage loan agreement reads as follows: 'If any provisions of this agreement conflicts with any provision of the covering mortgage bond, the provisions of this agreement shall prevail.'

advances that the applicant may require from the respondent and cannot, in my view, be read to imply exclusion of suretyship debts. For these reasons the applicant's submission that the mortgage bond does not cover the suretyship debt must fail.

[19] As regards the applicant's alternative submission of an agreement concluded by virtue of the cancellation figures provided by STBB on behalf of the respondent, I am in agreement with Mr Cooper who appeared on behalf of the respondent, that the applicant must show that the respondent has waived its rights in respect of the security it held for any other debt owed by the applicant, if the alleged contract in respect of the cancellation of bond figures is to succeed. In the circumstances, I find it highly impossible to believe that the respondent would easily relinquish the contractual rights it had in its favour. I am persuaded by the presumption against waiver pronounced by Christie where the author states:

'Having gone to all the trouble to acquire contractual rights people are, in general unlikely to give them up. There is therefore a presumption, even in some cases a strong one, against waiver.' [6]

[20] In order to establish a waiver, the onus is on the applicant to show that the respondent with full knowledge of its rights decided to abandon those rights whether expressly or by conduct plainly inconsistent with the intention to enforce it.[7] In my view the applicant has not demonstrated that the respondent was aware that it had waived its rights. The respondent has acknowledged that it made an error by providing cancellation figures. Although circumstances leading to that error have not been clearly set out in the respondent's opposing affidavit, the error is apparent from the papers. It is clear that the respondent sought to enforce its rights as early as December 2012 when it issued summons. The property in question was referred to in the summons and the respondent sought to an order declaring the property executable.

---

[6] Christie et al Christie's The Law of Contract in South Africa 6th ed p 457
[7] *Laws v Rutherfurd* 1924 AD 261 at page 263

[21] In the circumstances, it should have been clear to the applicant that something was amiss. He should have therefore realised that there could be a mistake and sought clarity, if any was required. In *Sonap Petroleum (SA) (Pty) Ltd (formerly known as SONAREP (SA) (Pty) Ltd v Pappadogianis*[8] the court held as follows:

> 'If the offeree realises (or should, as a reasonable man, realise) that there is a real possibility of a mistake, he has a duty to enquire whether the intention expressed was the actual intention. Whether or not there is duty to speak would, obviously, depend upon the facts of the case. The snapping up of a bargain, however, in the knowledge of the possibility that the declared intention did not represent actual intention, would not be bona fide. Where an offeree is alive to the real possibility of a mistake and, failing in his duty to speak and enquire, decides to snatch a bargain, there is no consensus and, thus, no binding agreement.'

[22] I am of the view that the applicant knew or ought to have known that there was a mistake and should have taken steps to seek clarity thereon. He cannot now claim the existence of a contract under these circumstances. The applicant's alternative argument that there was a concluded agreement regarding cancellation figures to which the respondent is bound by must also fail.

[23] On the issue of *estoppel*, I do not find merit in the applicant's argument. In our law *estoppel* is a weapon of defence[9] and cannot be invoked to create a cause of action.

[24] Even if the applicant was allowed to raise *estoppel*, I am not convinced that there was misrepresentation for the purposes of *estoppel* in this case. In *Africast (Pty) Ltd v Pangbourne Properties Ltd*[10] the court referred to the remarks of the authors in *Rabie & Sonnekus, The Law of Estoppel in South Africa, Butterworths*[11] where they stated as follows:

---

[8] 1992 (3) SA 234 (A)
[9] See *Mann v Sydney Hunt Motors (Pty) Ltd* 1958 (2) 102 GWLD at 107 D
[10] (2010/2117) [2013] ZAGPJHC 39 (3 March 2013)
[11] (2nd Edition, 2000) at p 63, Para 5.1

"In general, the premise applicable in all circumstances is that the *estoppel* assertor can only successfully rely on *estoppel* if the reasonable person in the street, in the position of the *estoppel* assertor would also have been misled by the conduct on which the *estoppel* is founded. To determine whether the reasonable person would have been misled, it might be helpful to answer the applicable question in the negative: The reasonable person would have been misled if it can be ascertained that the circumstances were such that they would have put the reasonable person on his guard and compelled him to ask more questions before accepting the allegations or representations of the representor at face value. If in reality the *estoppel* assertor had under the same circumstances neglected to ask for further explanation or had not been on his guard due to the fact that he tends to be more gullible than reasonable person would have been, then the conduct of the representor is not to objectively be classified as unreasonable or wrongful, and the reliance on estoppel must fail. It has already been emphasised that the doctrine of *estoppel* cannot be misused to protect the naïve or gullible against his own stupidity. Even the man in the street must take cognisance of facts that may have a bearing on his legal position.

Formulated otherwise, this qualification is also referred to when it is said that the reliance on representation must be reasonable.

The person who bases an *estoppel* on a representation made to him, must establish that he reasonably understood the representation in the sense contended for by him. It follows that he has to prove that his reliance on the representation was reasonable. He will therefore have to show that he did not know that the representation was untrue or incorrect, that he did not have information which put him upon enquiry, or, if he did, that he exercised reasonable care and diligence to learn the truth, and, generally that he was not mislead by a lack of reasonable care on his part." [12]

[25] Looking at the facts of this particular case, I find no misrepresentation for the reason that the applicant knew that he was indebted to the respondent, and that mortgage bond was registered at 4.5 million which specifically provided security for all debts that the applicant owed the respondent. Summons were served on him in December 2012, the immovable property was clearly mentioned in the summons and the relief sought included an order declaring the property executable.

---

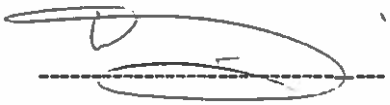
[12] *Africast (Pty) Ltd, supra* at para 44

[26] Another important factor is that the applicant has an alternative remedy, in my view. If his claim is found in contract as is suggested, he could either join the respondent as a defendant when sued for breach of contract by the purchaser or he could institute a claim for damages against the respondent for breach of contract. I do not agree that this is one of those exceptional cases that should be determined by way of an urgent interdict as in cases of restraint of trade as the applicant's counsel suggests. My view is that those cases are distinguishable in that an immediate irreparable injury can easily be proven. In this instance, there is no apparent evidence that the applicant might never be able to sell the property at R 4.1 million or more again. Whether the purchaser will be entitled to claim transfer costs is also another questionable factor. Clause 12 of the agreement of sale with the purchaser states that 'commission shall be earned on transfer'. If no transfer has taken place how would the purchaser hold the applicant liable to pay for transfer costs. All these factors in my view clearly show that the requirements of a final interdict have not been met and moreso that the application lacks urgency. The applicant waited for two weeks before he brought this application to Court. I do accept that the purchaser has threatened to cancel the agreement if no confirmation is received by 20 March 2013 that the applicant is capable of proceeding with the registration of transfer. This consideration is however outweighed by all the other factors I have already dealt with.

[27] In the result the applicant's application for a final order must fail. I see no reason why costs should not follow the result.

[28] I therefore make an order in the following terms:

1. The applicant's application is dismissed with costs.



NP BOQWANA

Acting Judge of the High Court of South Africa

APPEARANCES:

For the applicant:	Adv M V Combrink
Instructed by:	West & Rossouw Attorneys C/O Heidi van der Meulen Attorneys, Cape Town
For the respondent:	Adv G Cooper
Instructed by:	Sandenberg Nel Haggard C/O Niland Attorneys, Cape Town