IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 4292/2018

DATE: 2019/10/25

In the matter between

M A SALIE Applicant

and

TUINROETE AGRI LTD Respondent

JUDGMENT

BOZALEK, J: On 14 March 2018, and pursuant to an urgent application, the applicants obtained a rule *nisi* staying a certain judgment and order of the Riversdale Magistrate's court and a sale in execution of certain immovable property in Riversdale due to take place the following day, together with ancillary relief of a declaratory nature but which had no immediate effect.

Finalisation of the rule was opposed by the first respondent Tuinroete Agri Ltd, which I shall refer to also as the respondent, and which filed an opposing affidavit. The rule was extended on four or five occasions until 23 October 2019

when the matter was argued before me.

The first applicant, Mr Salie, is an Albertinia businessman who is described as a meat classificator and who carries on business as Albertinia Moslem Abattoirs. He is also the second applicant in his capacity as executor of his father's estate, part of which comprises two erven in Albertinia from or on one of which the business is apparently conducted.

10 Tuinroete Agri Ltd appears to be a private company carrying on business as an agricultural cooperative of sorts, both selling goods and providing credit. These descriptions are tentative because although the papers contain considerable detail and documentation of dubious relevance they lack basic facts and background. Instead it is left to the reader to try and glean these facts by reading between the lines or scouring documents which were attached as annexures for other purposes.

20 Whilst on this subject the papers were rather messily presented, not tagged or separated by partitions, despite the 18-month lead up to the final hearing. All in all this was a rather poor reflection on the parties' legal representatives.

Since the sale in execution has long since been averted it is

the ancillary relief which is the focus of the hearing at this stage. It reads as follows and I am quoting from the rule *nisi* granted on 14 March 2018 paragraphs 5, 7 and 8:

> "5. That the first respondent is interdicted from interfering with the applicant's title, interest and rights in respect of erf 1432 Albertinia.
>
> 6. That there is no credit agreement exists (sic) between the first applicant and first respondent, alternatively the agreement is putative, unlawful and invalid.
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> 7. That bond B27296/2008 endorsed on immovable property erf 1432 Albertinia held under deed of transfer T20401/1995 is unlawful, invalid and set aside.
>
> 8. That all the payments made by or on behalf of the first applicant to the first respondent pursuant to the putative agreement is without value and refundable."

Background

It is first necessary to give what background as can be gleaned to the present litigation. It would appear that on 25 January 2008 the first applicant, trading as Albertinia Abattoirs, made written application for credit to the respondent which was duly granted on 31 January 2008 when the first applicant was afforded a monthly credit limit of R150 000, a livestock production credit of half a million rand subject to the condition that a first bond be registered over erf 1432 for R2 million "as

security for this credit facility" in favour of the respondent.

A bond in such terms was duly registered against the property in the deeds office on 8 February 2008. It recorded that this was done pursuant to a power of attorney executed on 28 December 2007 effected by the first applicant's father in favour of the first applicant. A general power of attorney bearing that date was attached to the respondent's opposing affidavit apparently bearing the father's signature. Under the heading "Special provisions" the general power of attorney records in handwriting the words "Also full power of attorney on erven 1431 and 1432 Albertinia".

The applicants commenced using the credit facility but apparently fell into arrears in said amount timeously with the result that in or about April 2009 the respondent issued summons against the first applicant and his father in the Riversdale Magistrate's Court for payment of the sum of R736 000 odd interest and an order declaring erf 1432 executable. The particulars of claim make extensive reference to the bond which I have described and also to a section 121 notice in terms of the National Credit Act sent to the defendants.

On or about 25 March 2010 the respondent took default

judgment against the first applicant and his father in the amount of R736 000 odd and obtained an order of executability against the immovable property in question. That judgment remains standing at the present moment despite the defendant/applicants having commenced, but not having driven to a conclusion, an application for rescission of judgment in approximately January 2014. Various writs of execution were issued out by the respondent against both movables and the immovable property which culminated in the proposed sale in execution of the property on 15 March 2019, which sale was stymied by the present application.

The applicant raised a plethora of grounds and points why the ancillary declaratory relief should be granted but unfortunately in an unsystematic and scattershot manner.

In the founding affidavit the following allegations are made:

1. The bond was fraudulently registered against the property.
2. The first applicant was misled by the respondent into believing that he was entering into a “pawn transaction” … “in terms of which a credit would be extended to me by the first respondent and I would in return pledge the movable asset in business as a security for the credit in form of a notarial bond. It was never presented to me by

the first respondent that mortgaged bond (sic) will be registered against the property in favour of the first respondent."

3. The credit application which the first applicant signed did not on acceptance constitute an agreement for lack of detail regarding the credit product, the repayment period, insurance, interest, any other fees and what would happen on non-compliance.
4. The disputed credit agreement was unlawful or invalid for want of compliance with sundry other provisions of the National Credit Act and regulations framed thereunder, being too numerous to mention.
5. First applicant only used the credit facility for three months and paid all monies owing by him arising therefrom.
6. Judgment was taken against the applicant without any prior notice to him of the proceedings.
7. The default judgment and special executability order were erroneously sought and granted.
8. The respondent attached the immovable property after the initial attachment without complying with section 66(6) of the Magistrates Court Act and Magistrates Court rule 43(7) and various other sub rules regarding sales in execution.

In apparent contradiction of at least some defences the first applicant proceeds in his founding affidavit to state he did apply for and was granted a credit facility by respondent in January 2008.

In the penultimate paragraph of his founding affidavit the applicant states that if the default judgment and order of special executability of the magistrates court are not set aside he will lose the means of his livelihood. Nothing is said by the applicant justifying the relief whereby repayment to him of all monies paid in terms of the credit agreement is sought.

In the respondent's opposing affidavit the following is said or emerges:

1. The default judgment and special executability order remain of full force and effect and the applicants have acquiesced in the judgment for years.
2. There are in the papers serious disputes of fact, all of which were entirely foreseeable.
3. Various issues apparently in dispute are *res judicata*.
4. The bond was lawfully registered pursuant to a valid power of attorney. In this regard a letter of consent on behalf of the applicant's business signed by its CEO was attached, which letter also advises where the property's title deeds can be obtained.

5. The respondents CIPC registration number changed by one digit when it converted from a public to a private company and official documentation from that body confirming this is attached.
6. The last writ of execution obtained or authorised was served on the applicants and copies of the service returns are attached; it was publicised in the press and notice of the sale was sent by registered post to the applicants. In each of these instances proof of these averments is annexed.
7. The applicant/s had received full value for monies paid on the account and a copy of the running statement was annexed. It shows the following payments on behalf of the applicants: between September 2014 – that is some 4½ years after default judgment was taken - and March 2018 payments were made by the applicant/s of some R406 000 whilst interest of some R224 000 accrued.
8. In their aborted 2014 application for rescission of the default judgment and the special executability order the applicants attached documents evidencing the disputed bond but never once claimed that it had been fraudulently registered. This is *prima facie* borne out upon a reading of the affidavit made by the first applicant in support of the application, who also deposed therein to an agreement which he reached to

pay R750 000 in respect of the debt owing by him to the respondent.

9. The disputed agreement was an "incidental credit agreement" as defined by the National Credit Act with the result that various sections and regulations of the Act were not applicable to it.

10. Subsequent to the default judgment the respondent and applicant entered into an agreement in terms of which the respondent donated and the applicant was credited with the sum of some R520 000, reducing his indebtedness to approximately R850 000.

11. As at 8 March 2018 – that is when these proceedings commenced – the first applicant or both applicants were indebted to the respondent in the amount of R671 000 odd and to the extent that the writ of execution last issued reflected a much greater sum owing this will be corrected in due course.

12. An annexure to the applicant's founding affidavit showed that he had received personal service of the summons in the Riversdale Magistrate's Court action.

In his replying affidavit the first applicant:

1. Disputed the authority of the deponent to the opposing affidavit to depose to same. I interpose to record that there is no basis for such an objection,

the applicant's remedy being to invoke the procedures set out in Uniform Rule of Court 7 [See Ganes v Telkom Namibia 2004(3) SA 615 SCA paragraph 19].

2. Maintained that upon conversion from a public to a private company the respondent had become a different legal persona and could only act against the applicants upon taking a cession of rights.
3. Submitted that *res judicata* did not apply because the respondent had changed its identity as a legal persona and the other parties to the action were not the same as in the present application and which moreover was concerned with different issues.
4. Raised numerous minor technical points and made legal submissions.
5. Continued to insist that he and his late father had no prior knowledge of the registration of the bond and that it was fraudulent.

From this abbreviated synopsis of the papers it will be seen that there are a legion of factual disputes between the parties. In motion proceedings where there are material factual disputes and in the absence of a referral to evidence, a final order will only be granted if the facts as stated by the respondent together with such facts stated by the applicant as

are admitted by the respondent justify such an order. [Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd 1957(4) SA 234 (C) at p 235].

Virtually every material fact alleged by the applicants, namely no prior knowledge of the bond registration, that this registration was fraudulently done, that they owe nothing to the respondent, that no credit agreement was concluded and/or that the first applicant was misled into believing he was concluding a completely different type of credit agreement, that default judgment was taken without prior notice to them, is not only disputed by the respondent but is *prima facie* disproved by annexed documentation and contradictory averments by the first applicant.

Notwithstanding his reference to the possibility of a referral to trial or evidence and notwithstanding all the clear prior indications of looming and entirely foreseeable material disputes of facts, Mr Sharuh on behalf of the applicants made no such application. Even if such an application were made it would have been doomed to failure since the disputes of fact are manifold, broad, do not appear to be genuine and in any event for reasons which will become apparent are most unlikely to tip the balance in the favour of the applicant. [See *inter alia* Kalil v Decotex (Pty) Ltd 1988(1) SA 943(A) at 979

H].

Adopting the above approach to the factual disputes leaves no basis for any factual underpinning for the relief sought by the applicants. There are at least two further reasons why the application must fail. The first such reason is that most, if not all, of the principal issues between the parties were determined in prior litigation in the magistrate's court action. The requirements for the successful raising of the defence of *res judicata* are that the previous judgment was given in an action or application by a competent court between the same parties based on the same cause of action with respect to the same subject matter. [See Bafokeng Tribe v Impala Platinum Ltd 1999 (3) SA 517 B]. There is no enquiry whether the judgment is right or wrong but simply whether there is a judgment. [African Farms and Townships v Cape Town Municipality 1963 (2) SA 555 (A) at 564].

A default judgment, even one granted in error and which should be rescinded, stands and constitutes *res judicata* until set aside. [Jacobson v Havinga t/a Havingas 2001(2) SA 177 (T)].

The prior action in this case was heard by a competent court and involved the same parties. The respondent, the first

applicant and his father were the parties in the magistrates court action whilst in the present application the parties are again the first applicant, the respondent and, following the death of the first applicant's father, his place is taken by the applicant in his capacity as executor of his estate, i.e. he stepped into the shoes of his father to all intents and purposes.

In the action the respondent claimed payment of monies owing in terms of the credit agreement and an order of special executability in respect of the immovable property based squarely on the registration of the bond. In the present application the applicants:

1. Dispute liability for any monies owing in terms of the Credit Agreement and seek an order declaring that any payments made pursuant thereto were without value and must be returned to them.
2. They seek a declarator that there is no credit agreement but when that was the underlying *causa* for the money order sought in the action.
3. They seek the setting aside of the bond when this was the underlying *causa* for the order of special executability sought by the respondent in the action.

Approached from a different angle, and having regard to the

applicant's case in the present application, it is clear that all of the major allegations and claims upon which it rests would and could have been raised and were material in the action had they defended same, namely no valid credit agreement, the bond was fraudulently registered and that no monies were owing by the applicants to the respondent.

Mr Sharuh attempted in vain to persuaded the court that the issues in the two fora were different. At best any differences were differences of form and not of substance. In my view the applicant's sole remedy in the circumstances in which they find themselves was to seek rescission of the default judgment in the magistrate's court action and the special order of executability.

Tellingly, they initially adopted this course but abandoned it midway some five years ago. The applicants have failed to make out a case for any relief in the face of the respondents' reliance on the principle of *res judicata*.

This leads on to a further overriding reason why the applicants cannot prevail in the present application, namely that they have acquiesced so to speak in the judgment of the magistrate's court. The relevant legal principles are those relating to peremption which in essence hold that "no person

can be allowed to take up two positions inconsistent with one another or, as is commonly expressed, to blow hot and cold, to approbate and reprobate". [Nkata v First Rand Bank Ltd 2014 (2) SA 412 WCC paragraph 30].

The principles of peremption apply not only to appeals but to rescission [Sparks v David Pollack & Co (Pty) Ltd 1963(2) SA 491 (T) at 469 D-F]. In order to show that someone has acquiesced in a judgment the court must be satisfied on the evidence that he has done an act which was necessarily inconsistent with his continued intention to have the case reopened or to appeal. [Hlatshwayo v Mare & Deas 1912 (AD) 242 at 259].

On the applicant's own version in August 2014 he entered into a post judgment agreement in terms of which his debt was reduced by approximately R520 000; further that after initiating an application for rescission in or about January 2014 he has since taken that application no further and, as I have outlined above, between September 2014 and March 2018 made extensive payments apparently on an unconditional basis in reduction of his debt to the respondent. Each of these actions, and certainly if taken cumulatively, constitute in my view action inconsistent with the applicant's continued intention to have the Riversdale Magistrate's Court action reopened.

It follows that the default judgment and order or special executability stand until such time as they are rescinded, if such an application is still competent.

Yet a further consequence of this finding is that many of the issues thrown up by this application are academic or moot. It is trite that a court will not decide abstract, academic or hypothetical questions which can produce no concrete or tangible results. [JT Publishing (Pty) Ltd v Minister of Safety and Security & Others 1997(3) SA 514 (CC) para 15].

Having regard to all these shortcomings in the applicants' case it has quite clearly failed to discharge of onus it bears to justify any of the relief sought. Given the overarching nature of the fatal flaws in the applicant's case it is unnecessary in my view to devote any attention to the numerous minor technical legal points raised by the applicant on these papers. Most of these points fell to be taken in the magistrate's court action in any event.

I have had regard to many of the various procedural points and find that they have no merit and do not affect the continuing validity of the magistrate's court judgment and order. It follows that the application must be dismissed with costs.

Some argument was delivered on whether the applicants should have to bear liability for postponements which were not attributable to any fault on their part. As I understand the position none of the postponements were attributable to the respondent. In these circumstances it is irrelevant precisely what caused them since to the extent that these had a cost repercussion for the respondent the applicants must bear the brunt thereof, given that the application was ill-conceived and ill-founded from its inception.

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For these reasons the rule *nisi* initially granted on 14 March 2018 is discharged and the application as a whole is DISMISSED with costs.

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BOZALEK, J

JUDGE OF THE HIGH COURT

20 DATE: ……