

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

Case no.: **2012/16759**

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

ACACIA FINANCE (PTY) LTD

APPLICANT

And

SURE GUARD CC

1ST RESPONDENT

UMRA OMAR NOORMOHAMED

2ND RESPONDENT

IRFAN OMAR NOORMOHAMED

3RD RESPONDENT

DEFACTO INVESTMENTS 210 (PTY) LTD

4TH RESPONDENT

THE CITY OF TSHWANE.

5TH RESPONDENT

Coram:

Dlamini J

Date of Request of Reasons:

14 February 2023

Date of delivery of reasons:

29 March 2023

These reasons are deemed to have been delivered electronically by circulation to the parties' representatives via email and the same shall be uploaded onto the caselines system.

JUDGMENT

DLAMINI J

[1] On 5 September 2022, I made the draft order marked "X" an order of the court. Below, are my reasons for that order.

[2] This an application wherein the applicant seeks monetary judgment coupled with an order declaring an immovable property specially executable. A conditional prayer for rectification of the Agreement to reflect the correct title deed number for Erf [...]. A costs order against the first to fourth respondents for the present application. Finally, an order awarding costs on an attorney and client scale against the fourth respondent only, for the unopposed application under case number 85936/2018 before Malungana AJ, in which the registration of the fourth respondent was reinstated.

[3] The first to fourth respondents have launched a counter-application in which they seek an order setting aside the registration of the covering mortgage bond attached to the founding affidavit as annexure "JK5" over the immovable property known as Erf [...] Claudius Ext 1 Township.

[4] The applicant is ACACIA Finance (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic Of South Africa.

[5] The first respondent is Sure Guard CC, a close corporation duly registered and incorporated in terms of the company laws of the Republic of South Africa.

[6] The second respondent is Umra Omar Noormohamed, an adult female businesswoman.

[7] The third respondent is Irfan Omar Noordmohamed, an adult businessman.

[8] The fourth respondent is De Facto Investments 210 (PTY) Ltd, a company duly registered and incorporated in terms of the company laws of South Africa.

[9] The applicant testified that on or about 17 October 2013, the applicant entered into a written Settlement Agreement with the first to fourth respondents (the Settlement Agreement). On 16 October 2013, the Settlement Agreement was made an order of the Court.

[10] The material terms of the Settlement Agreement are as follows;-

10.1 the respondents acknowledged their indebtedness to the applicant and undertook to repay the debt in various monthly installments, including the applicant's legal costs.

10.2 that in the event that the respondents breach any of the obligations in the Settlement Agreement, the applicant will be entitled to proceed with the execution steps against the respondent's property more fully described as Erf [...] Claudius Extension, registration division J.R. Province of Gauteng.

[11] It is the applicant's case that the respondents failed to make consistent payments in terms of the Settlement Agreement and that since 29 November 2016, the respondents have failed to make any further payments whatsoever to the applicant.

[12] It is the applicant's case that once the Settlement Agreement was made an order of Court until the Order has been varied and set aside, the Order stands. Therefore according to the applicant, the prescription period attached to the Order is 30 (thirty) years and not 3 (three) years as contended by the respondents.

[13] As a result of the failure of the respondents to honour the Settlement Agreement, the applicant avers that it launched this application.

[14] In their reply, the respondents argue that there are massive irresolvable disputes of facts on the papers. That the applicant should have foreseen the massive factual disputes and should not have approached this Court on application. As a result, avers the respondents that they seek an order that the application be dismissed with costs.

[15] The question to be answered therefore is whether there exist material disputes of facts in this matter, in such a way that this court will be unable to determine this application as it stands.

[16] The principles of determining whether the exists material disputes of facts are now well established and have been pronounced upon in several Courts decision.

[17] In *Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) the Court set out this principle as follows; "*In certain cases, the denial by the respondent of a fact alleged by the applicant may not be such as to raise real, genuine or bona fide dispute of fact.*" The Court pertinently stated that far-fetched allegations by the respondent should be rejected on the papers.

[18] In motion proceedings, a final order can only be granted if the facts alleged in the respondent's affidavit coupled with those alleged in the applicant's affidavit which has been admitted or denied by the respondent, permit such relief.

[19] Motion proceedings by their very nature are about the resolution of legal disputes based upon common cause facts; they are not designed to determine probabilities, NDPP v Zuma 2009 (2) SA 277 (SCA) at 291 A.

MATERIAL DISPUTES OF FACTS

[20] Below, I will deal in seriatim with the respondent's submission to determine whether material disputes of facts do exist in this application.

BRINGING THE APPLICATION UNDER 2020 CASE NUMBER

[21] The applicant has brought this application under two case numbers. In this regard, the applicant alleges that both these matters have been settled around 2013, and the Settlement Agreement was made an order of the court on 16 October 2013.

[22] In this regard, the respondents submit that the applicant cannot revive the two matters which became settled under the Settlement Agreement and it is thus irregular to bring the application under the case numbers of two matters which have been settled by a Settlement Agreement.

[23] Therefore, argues the respondents that the if it was to be the applicant's case that the respondents did not comply with the Settlement Agreement and the applicant sought enforcement of the Settlement Agreement, then in that event the applicant should have utilized a new case number for that application.

[24] In reply, the applicant argues that the reason that the case number was used for the present application is based on the fact that the first to fourth respondents defaulted in terms of a Settlement Agreement that was made an order of the Court under the same case numbers. The applicant's explanation is plausible. In any event, there exists nothing in the Uniform Rules of Court and the Court's practice directive prohibiting the applicant from proceeding under the same case numbers.

PRESCRIPTIVE PERIOD

[25] On this aspect, the respondents insist that there was never any suretyship signed by the company and in that context, the registered covering mortgage bond is only an instrument of security and not the form of the indebtedness itself.

[26] The respondents argue that the mortgage bond is one registered over a property of a surety and not a mortgage bond given by the principal debtor, the debt is not one secured by a mortgage bond and as a result, the prescriptive period is

only three years. Therefore the debt has also become prescribed as the prescription period in the present circumstances is three years and not thirty years.

[27] There is no merit in the respondent's argument. The applicant is pursuing this application on the basis of the Settlement Agreement that was made an order of the Court. It is an established principle of our law that unless varied or rescinded, court orders are binding on the respondents. The result is that the debt on which this application is based is premised on a judgment debt, accordingly the requisite period of prescription is 30 years and not 3 years as submitted by the respondents.

RECTIFICATION

[28] In so far as the rectification sought by the applicant, the respondents submit that no order for rectification was sought by the applicant in its notice of Motion and second that rectification should be sought by way of action and not an application.

[29] In my view, there is no merit to the respondent's contention. The rectification sought by the applicants is not a substantial rectification that necessitates a separate stand-alone application. What is sought to be rectified is a minor typographical error in the number of the title deed. Rectification is accordingly granted.

FULL AND FINAL SETTLEMENT

[30] The respondents insist that it has made several payments to the applicant. According to the respondents when the last payment was made, it was specifically agreed with the applicant that the payment would be in full and final settlement of whatever amount may still be owed under the Settlement Agreement.

[31] In reply, the applicant argues that it never intended and never absolve the respondents of their indebtedness by receipt of the payment of R200 000.00.

[32] In my view, the respondent's contention lacks merit. The respondents do not indicate who acted on behalf of the applicant when this full and final settlement offer was made. Significantly, the respondents do not indicate whether the full and final

settlement was oral or in writing. The Settlement Agreement was reduced to writing and signed by both parties. It will thus be excepted that the alleged offer in full and final settlement should have been reduced to writing especially in light of the existence of the non-variation clause in the Settlement Agreement. Absent a signed variation agreement, the respondent's contentions in this regard are dismissed.

CASH PAYMENTS.

[33] On several occasions, the respondents allege that they had made various cash payments to the applicant. On this score, the respondents are uncertain whether the applicant did subtract these cash payments and the respondents doubt whether the aforesaid cash payments were properly captured by the applicant.

[34] Further that the respondents gave several air conditioning units to the applicant, and the intention was that the value of these air conditions would also be subtracted from the debt.

[35] This contention is specifically denied by the applicant that it received certain cash payments from the respondents and that it accepted payments from the respondents in the form of air conditioners.

[36] The respondent's assertions in this regard are implausible and must be dismissed. I find no basis that a company in the business of commercial lending would accept cash payments and air conditioners in circumstances where the applicant is owed a substantial amount, part of which is secured by a covering surety bond. Moreover, the respondents do not attach any amount or value of the air conditioners that they allegedly gave to the applicants.

CAPITAL AMOUNT NOT ADVANCED.

[37] It is the third respondent's case that the applicant never advanced a full capital amount of R1 million to the third respondent but instead subtracted an amount of R250 000, 00 which according to the applicant, represented a debt owed by one Mr. Weinstein.

[38] The third respondent's contention in this regard is of no moment and does not assist the third respondent. This is so because the applicant's claim against the respondents is founded on a Settlement Agreement that was made an order of the Court and not on the amount that was advanced by the applicant to the third respondent.

AUTHORITY TO ENTER INTO A SETTLEMENT AGREEMENT

[39] Finally, the respondents submit that Albert Jacobs never had the authority and mandate to enter into the Settlement Agreement on behalf of the third respondent's wife – the second respondent, and the company.

[40] The applicant in its replying affidavit testified that Mr. Jacobs has provided its attorneys with a letter wherein, Mr. Jacobs, unequivocally confirms his mandate on behalf of the respondents, his instructions to settle, and the circumstances in which the Settlement Agreement was made an order of Court. The respondents have made bald and unsubstantiated allegations in this regard and have not submitted any evidence in this Court to rebut Mr. Jacobs's testimony. Accordingly, the respondent's submission in this regard is dismissed.

COUNTER APPLICATION

[41] I now turn to deal with the respondent's counter application.

[42] In the founding papers, the respondents aver that there is no legal basis for the existence of a mortgage bond over the company's property in the sense that that the company never signed a suretyship and further that there was no authority given on behalf of the company for it to be bound as surety. Finally, the respondents submit that the debt has now been extinguished as a result of the effluxion of time, and as a result of the 3-year prescriptive period, there is no longer an existing debt that can be validity secured by the mortgage bond.

[43] There is no evidence before the Court to support the respondent's contentions in this regard. The applicant's claim is based on a judgment debt. In terms of the law, the prescription period for a judgment is 30 years and not 3 years as alleged by the respondents. Further, the only director of the fourth respondent, the second respondent signed a power of attorney, which expressly refers to a resolution of the directors of the fourth respondent which empowered the second respondent to act. It is on this basis that caused the registration of the mortgage bond. Accordingly, the counter-application is meritless and is dismissed.

[44] In all the circumstances mentioned above, it is my considered view that there exist no material disputes of facts in this matter. The respondents have made bald and unsubstantiated defences. There are no bona fide defences that have been submitted by the respondents to oppose the applicant's claim. As result, I am satisfied that the applicant has succeeded to establish its case and is entitled to the orders that it seeks.

ORDER

1. The order marked X that I made on 5 September 2023 is made an order of this court.

DLAMINI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Date of Request for Reasons: 14 February 2023

Delivered: 29 March 2023

For the Applicant: Adv D Linde
dlinde@rsabar.com

Instructed by: Coelho Barata Attorneys
pedro@cb-attorneys.co.za

For the 2nd to 4th Respondents: Adv R Beaton SC
Russelbea7@gmail.com

Instructed by: Jaffer Incorporated
kganarek@kkinc.co.za