

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 84696/2019

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO

Date: 31/01/2020

Signature:

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In the matter between:

RAHAT NABEEL CHOUDRY

APPLICANT

and

BRONKHOR CC

FIRST RESPONDENT

SHERIFF OF THE HIGH COURT –

SECOND RESPONDENT

BRONKHORSTSPRUIT

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JUDGEMENT

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Van der Schyff, J

- [1] The applicants initially approached the Court on an urgent basis on 8 November 2019. They sought an order:
- i. Staying the warrant of execution issued under case number 49389/2018;
  - ii. Staying all further execution under case number 49389/2018;



- iii. Ordering the second respondent to open up the applicant's premises trading as M & A Supermarket at Bronkhor Building, Shop 173, Bronkhorstspuit and to give applicant free and undisturbed possession of same.

[2] The Court granted an interim order that the warrant of execution be stayed pending the finalisation of the application. The matter was enrolled for final adjudication on 27 January 2020.

#### Applicant's case

- [3] It was clear from the onset that the applicant no longer required an order staying the warrant of execution as prayed for in the Notice of Motion or argued for in the written Heads of Argument filed by the applicant. It was argued on behalf of the applicant that the Court was entitled, under the payer for further and alternative relief, to permanently set aside the writ of execution. Applicant contended that the underlying cause of the judgment debt no longer exists due to a compromise being concluded between the parties.
- [4] The applicant averred that the settlement agreement concluded between the parties during February 2019 amounted to a compromise and extinguished the underlying cause for the warrant of execution.

#### Respondent's case

- [5] The respondent claimed that it was within its rights to enforce and execute the judgment obtained on 15 November 2018 and that the agreement concluded between the parties during February 2019 does not amount to a compromise that extinguished the judgment debt.

#### Legal principles

- [6] It is trite that an applicant who seeks final relief on motion must accept the version set up by his opponent unless no real *bona fide* factual disputes arise. In the current



matter, the common cause facts determine the context within which the court must determine the application.

- [7] Harms<sup>1</sup> defines a compromise or settlement as “*a contract which has as its objective the prevention, avoidance or termination of litigation*”. It has the effect of *res judicata* and “*is an absolute defence to any action based on the original claim*”.
  
- [8] In *Van Zyl v Niemand* 1964 (4) SA 661 (A) it was held, as summarised in the headnote, that “*A settlement has the same effect as res judicata, and accordingly it excludes an action on the original cause of action, except where the settlement expressly or by clear implication provides that, on non-compliance with the provisions thereof, a party can fall back upon his original right of action.*”
  
- [9] In *Wilson Bayly Homes (Pty) Ltd v Maeyane and Others* 1995 (4) SA 340 (T) 345E the Court held: “*The contract in the present case was one of compromise. The nature of such a contract is that it is concluded because the rights of the parties are uncertain, and they choose not to resolve that uncertainty. By the very nature of such a contract, there can be little room for finding that the parties must have intended their contract to depend upon the existence of one or other of the factors relevant to their respective rights. It is precisely to avoid testing them that they compromise.*”
  
- [10] When any agreement is interpreted the principles relating to interpretation as set out in *Natal Joint Municipality Pension Fund v Edumeni Municipality* 2012 (4) SA 593 (SCA) must be applied.

#### Common cause facts

- [11] It is common cause that:
  - i. The respondent obtained judgment in the amount of R554 963.42 against the applicant;
  - ii. The cause of action was breach of contract, in that the applicant who leased a shop from the respondent, failed to honour the terms a lease agreement

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<sup>1</sup> LTC Harms, *Amler's precedents of pleadings*, LexisNexis, 7<sup>th</sup> ed, 97.



concluded between the parties. The respondent cancelled the lease agreement, and obtained judgment against the applicant on 15 November 2018 for arrear lease payments;

- iii. The parties then entered into a settlement agreement during February 2019 after the applicant and his co-debtor were for the first time served with a writ of execution and the court ordered their eviction from the premises;
- iv. The settlement agreement provided for the revival and continuation of the lease agreement, and the payment of the judgment debt, together with *mora* interest and the respondent's legal fees to the date of the settlement agreement, in monthly instalments of R20 000,00;
- v. The agreement also contained a provision stipulating that "*should the Defendant [applicant] at any time fail to adhere to the terms of this Agreement, the Plaintiff [respondent] shall without further notice to the Defendants, be entitled to proceed to issue both a writ of attachment and a writ of eviction pursuant to the order of court dated 15 November 2018*";
- vi. After the conclusion of the settlement agreement the applicant defaulted on payments and the respondent proceeded to execute the judgment debt on the warrant of execution issued in 2018;
- vii. The applicant made some payments towards the judgment debt since the judgment was obtained in November 2018;
- viii. The warrant of execution refers to the original judgment debt without any reconciliation of the amounts paid, refers to the wrong address and wrongly reference the name of business entity where the movables are located as "M & M Supermarket" instead of "M & A Supermarket". The Sheriff did, however, execute the writ at the correct address.

#### Discussion

- [12] It is common cause that the applicant and respondent concluded the so-called settlement agreement after the applicant and a co-debtor were served with a writ of execution on 1 February 2019.



- [13] It is not indicated on the papers that there was any dispute between the parties pertaining to the continuance of any litigation that needed to be resolved or avoided at the time when the settlement agreement was concluded.
- [14] On the face of it, the parties concluded the agreement to allow the applicant to continue trading and to pay off the judgment debt, inclusive of the costs and *mora* interest, in instalments.
- [15] In order to protect its interests, the respondent, however, reserved the right to execute the judgment debt immediately, without further notice, if the applicant defaulted on this agreement. The settlement agreement thus expressly provides that on non-compliance with the provisions thereof, the respondent can fall back upon his right to execute the judgment debt.
- [16] The agreement, however, revived the lease agreement and the lease agreement thus exists parallel and subject to, the agreement to pay of the judgment debt, *mora* interest to date of settlement, agreed amount of legal fees and interest levied on the outstanding amount as agreed upon, in monthly instalments of R20 000,00.
- [17] Due to the applicant's failure to honour the terms of the settlement agreement and the fact that the applicant defaulted on the instalment payments, the respondent is entitled to enforce the judgment obtained in November 2018 and may proceed to issue both a writ of attachment and a writ of eviction pursuant to the order of court dated 15 November 2018, as agreed upon by the parties.
- [18] I pause to note that it was argued on behalf of the applicant that the terms of the lease agreement that stipulate the process to be followed if the applicant defaults on that agreement, are in direct contrast to the settlement agreement that determines that the respondent will be entitled to proceed with a writ of attachment and a writ of eviction in the event of non-adherence to the terms of the settlement agreement. The respondent answered and stated that the lease agreement was effectively varied by this provision of the settlement agreement.
- [19] Considering the context within which the lease agreement was revived, I am of the view that its continuance is subject to the terms of the settlement agreement. In the



event that the applicant honours the terms of the settlement agreement, the lease will continue unabated. Where the terms of the settlement agreement are honoured and the applicant defaulted on lease payments, the legal process as prescribed in the agreement must be followed to cancel the lease contract. However, where the terms of the settlement agreement are breached, the respondent is entitled to issue a writ of attachment and a writ of eviction without further notice, and thus the lease agreement will necessarily cease to exist when the applicant and his co-debtor are evicted. This is a logical result flowing from the interpretation of the settlement agreement.

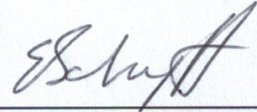
- [20] The applicant did not and do not purport to seek a rescission of the judgment which is the foundation on which the writ of execution was issued. In the absence of a finding that a compromise agreement barring any proceedings aimed at executing the original judgment was concluded, the judgment stands, and a *causa* exists which justifies the issue of the writ.
- [21] In the affidavit, the applicant challenges the validity of the writ on the basis that it contains incorrect information. I am of the view that the warrant of execution must be amended to reflect the correct amount owed and due in terms of the court order dated 15 November 2018 and the correct address of the applicant where the warrant is to be executed.
- [22] There is no reason to deviate from the general rule that costs follow suit.

### ORDER

As a result, the following order is made:

1. The application is dismissed.
2. The Registrar is directed to issue an amended warrant of execution to reflect the correct amount owed by the applicant in terms of the judgment of 15 November 2018, and the correct address where the attachment is to be executed.
3. The applicant is to pay the costs of the application.





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Elmarie van der Schyff  
Judge of the High Court, Pretoria

Counsel for the applicants:

Instructed by:

Counsel for the respondent:

Instructed by:

Date of the hearing:

Delivered:

Adv Groenewald

Friedland Hart Solomon and Nicholson

Adv LT Taljard

Haasbroek & Boezaart

27 January 2020

31 January 2020