IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 2906/2013

In the matter between:

PLETT BUILDING SUPPLIES CC
t/a PLETT BUILT IT Applicant

and

MLUNGISI BONGANI WILLIAM MGOBO
(ID NUMBER: …) Respondent

JUDGMENT

REVELAS J:

[1] This is an application for judgment on confession in terms of rule 31(1)(c) of the Uniform Rules of Court. The applicant seeks an order in the following terms against the respondent:

(a) Payment of the sum of R1,518,691.29 (One Million Five Hundred and Eighteen Thousand Six Hundred and Ninety-One Rand and Twenty-Nine Cents);

(b) Payment of interest at the rate 15.5% per annum from 1 May 2013 to 28 August 2014 in the sum of R376,443.21 (Three Hundred and Seventy-Six Thousand Four Hundred and Forty-Three Rand and Twenty-One Cents);

(c) Further interest at the rate of 9% per annum from 29 August 2014 to date of final payment;

(d) Payment of legal costs up to and including 28 August 2014 in the sum of R216,962.36 (Two Hundred and Sixteen Thousand Nine Hundred and Sixty-Two Rand and Thirty-Six Cents);

(e) An order declaring the following immovable properties owed by the respondent to be specially executable:

(i) Erf …3, Aston Bay, in the Kouga Municipality, Division of Humansdorp, Province of the Eastern Cape, in extent 629 (six hundred and twenty-nine) square metres, held by Deed of Transfer No.

T73437/2006 (hereinafter referred to as *"the Aston Bay Property")*; and

(ii) Erf …1, Dainfern, Extension 11, in the City of Johannesburg Muncipality, Province of Gauteng, in extent 1004 (one thousand and four) square metres, held by Deed of Transfer No. T4445/2008 (hereinafter referred to as *"the Dainfern property")*;

(f) Costs of the attorney and client scale from 29 August 2014 to date of final payment.

[2] The applicant is a distribution and retailer of building products. During April 2013, Amaxibiso Structural and Civils CC *("Amaxibiso")* became indebted to the applicant in the amount of R1,787,308.66 for goods sold and delivered in terms of a credit agreement. The respondent, the sole member of Amaxibiso signed the agreement on behalf of Amaxibiso. A year later and pursuant to the aforesaid credit agreement, the parties concluded a written acknowledgement of debt *("AOD")* on 15 April 2014. In terms thereof the respondent, who is the sole member of Amaxibiso, stood surety, as co-principal debtor for payment of the aforesaid debt and interest thereon. In terms of the

AOD the applicant undertook to hand the roof certificates which aver payment certificates for work done by Amaxibiso for the Koukamma Municipality *("the municipality"),* to Amaxibiso in return for the acknowledgment of its debt. The respondent, as surety, for its obligations contained in the credit agreement and the AOD, with specific reference to the amounts contained in the roof certificates, undertook to register a bond over his immovable property in Aston Bay and another bond over his immovable property in Dainfern, Gauteng. The AOD also stipulates that the respondent may not sell any of his properties without the prior, written consent of the applicant. An interdict was also registered against this property at a later stage. The AOD also provided that in the event of Amaxibiso or the respondent's failure to comply with the terms of acknowledgment, the whole debt will become immediately *"owing and payable"*.

[3] According to the applicant, save for two payments of R100,000.00 and R80,000.00 made respectively on 31 March 2014 and 23 May 2014, Amaxibiso failed to make further payments on the agreed dates. According to Amaxibiso, a payment of R100,000.00 was made on 1 March 2014.

[4] The applicant subsequently issued summons against the respondent for the whole amount of the debt, plus interest and costs on 2 September 2014. Thereafter, in an attempt to resolve the dispute, the respondent, Amaxibiso and the applicant, on 23 September 2014, concluded an *"addendum"* to the AOD.

[5] In this addendum, Amaxibiso and the respondent admit and confirm their indebtedness to the applicant as set out in the AOD and also their failure to comply with its terms. They gave an undertaking that the respondent's total indebtedness would be paid off by 1 October 2015, and that R1,700,000.00 of the debt would be paid off by 1 May 2015.

[6] The addendum also provided for signature of a confession to judgment by the respondent, incorporating a consent to his immovable properties being declared executable. It was specifically stated in the addendum that the registration of a covering bond over the respondent's Dainfern property would be a material term of the acknowledgment and the addendum. The Dainfern property is the respondent's primary residence.

[7] Also on 23 September 2014, the respondent, assisted by his attorney signed a document *("the consent")* in terms whereof the applicant undertook to hold over the application, subject to the respondent honouring the undertaking to pay in terms of the addendum and more particularly confessed to the claims as set out in the summons.

[8] When the respondent failed to comply with the terms of the addendum and AOD, by not repaying the whole debt by October 2015, only portion thereof, the present application was brought. The applicant avers that the respondent only made five payments of R50,000.00 each (in total R250,000.00) during the period 7 October 2014 to 2 February 2015. The respondent, despite the aforesaid payment, failed to pay the sum of R1,700,000.00 before 1 May 2015 and the total debt by October 2015 in terms of the agreement. His debt to the applicant thus, according to the applicant, amounted to R1,518,691.29 together with interest and legal costs.

[9] The aforesaid is the history of the matter. The respondent's opposition to the relief sought is on the following grounds:

[10] Firstly, the respondent disputes that only five payments were made in the amount of R250,000.00. He contends that he has made payments in the amount of R530,000.00 between March 2014 (during which month he made two payments of R100,000.00 each including the one referred to herein before made on 2 March 2015) and 2 February 2015. Except for the amount of R100,000.00 paid on 2 March 2014, the remainder of the payments accord with the applicant's averments in this regard. Since the applicant has not filed a replying affidavit, I will accept for present purposes that the capital indebtedness of R1,787,308.86 was reduced by R530,000.00 leaving a total of R1,257,308.86.

[11] The respondent further states that the applicant registered an interdict against the Ashton Bay property in the amount of R350,000.00. He has also sold this property for R650,000.00, of which R350,000.00 he says on oath, would be paid to the applicant. Accordingly the capital of R1,259,308.00 would be reduced further, leaving R907,308.86, which is less than the amount of R1,430,057.88, which the applicant would obtain in its capacity as a cessionary, as explained below and thus the applicant would therefore receive R522,749.02 in excess as a result of the cession.

[12] The AOD contained a clause 6 under the heading *"Cession".* This clause provided for an *"out-and-out cession"* of Amaxibiso's right, title and interest in and to such payments as the PRINCIPAL DEBTOR might receive from the municipality *"and/or the NMBM pursuant to the submission of the ROOF CERTIFICATES to them"*. Clause 6 was deleted by the parties to the AOD. The significance of this deletion becomes apparent when one has regards to the facts giving rise to the respondent's second ground of opposition below.

[13] The respondent contends that subsequent to the signature of the AOD on 15 April 2014, and the signature of the addendum on 23 September 2014, the parties signed another document. This was an agreement of cession drafted by the applicant's attorney of record. It is a comprehensive, detailed document concluded by Amaxibiso (the principal debtor) as *"the cedent",* the applicant as *"the cessionary"* and the municipality*.* It is in my view, highly significant that the applicant makes no mention of this agreement in its founding papers.

[14] The respondent's main argument in opposition of the relief sought by the applicant, is that the cession constitutes a novation of all the prior agreements and the applicant is consequently precluded

from relying on any of them and is thus not entitled to a judgment by confession.

[15] The applicant disputes that the parties ever intended to novate their former agreements or that the cession agreement, in law, constitutes a novation. In addition the applicant relies on the fact that Amaxibiso, and not the respondent, was party to the cession agreement. Accordingly, it argues, the applicant was entitled to pursue the current relief sought against the respondent.

[16] The agreement of cession provides that the agreement will become binding if each party has signed a separate copy. The respondent signed the agreement of cession. On oath he stated that he left a copy of the agreement signed by himself and the municipal manager at the offices of the plaintiff's attorney. This is not in dispute. Subsequently, in a letter, the applicant's attorneys denied receipt of the agreement. Since they were the author of the agreement it hardly matters. In the absence of a replying affidavit I will accept that a binding agreement occurred between the parties. Counsel for the applicant did not argue on the basis that there was no such cession agreement. On the contrary, the application was argued

on the basis its existence was accepted. Only the consequences thereof, i.e. whether it created a novation, was challenged.

[17] The relevant part of clause 2 of the agreement of cession reads:

"2.5 "The CESSIONARY has:

(a) demanded payment of the CAPITAL and INTEREST from the CEDENT;

(b) withheld certain roof certificates from the CEDENT as a result of the non-payment of the CAPITAL (the "ROOF CERTIFICATE"); and

(c) entered into an Acknowledgment of Debt and Addendum to Acknowledgment of Debt ("AOD") with the CEDENT in favour of itself.

2.6 The CEDENT having breached the AOD and the full debt is now due and owing to the CESSIONARY.

2.7 The CESSIONARY initiated an application for the liquidation of the CEDENT in the Port Elizabeth High Court under case number 2973/13 (the "APPLICATION").

2.8 Further, the CEDENT issued summons against the KOUKAMMA MUNCIPALITY for an amount of R1 430 057,88 (ONE MILLION FOUR HUNDRED AND THIRTY THOUSAND AND FIFTY SEVEN

RAND AND EIGHTY EIGHT CENTS) ("the AMOUNT") under case no.

2.9 The KOUKAMMA MUNICIPALITY has consented to paying the CEDENT the amount as per the summons.

2.10 The KOUKAMMA MUNICIPALITY has agreed that the amount of R1 430 057,88 (ONE MILLION FOUR HUNDRED AND THIRTY THOUSAND AND FIFTY SEVERN RAND AND EIGHTY EIGHT CENTS) due to the CEDENT may be ceded and assigned by the CEDENT to the CESSIONARY on the terms and conditions reflected in this agreement." (my emphasis)

Discussion

[18] In *Rodel Financial Service (Pty) Ltd v Naidoo and Another*[1], the following was stated regarding the principles applicable to novation:

> "Novation is the replacing of an existing obligation by a new one, where the existing obligation becomes discharged. With voluntary novation where the existing contract is between the same parties, the issue is essentially a matter of intention and consensus. Since it involves a waiver of right, there is a presumption against novation and the onus of showing it has occurred lies with the party asserting this.

[1] 2013 (3) SA 151 (KZP) para [13]. See also *Barclays National Bank Ltd v Smith* 1975 (4) SA 675 (D).

> Thus, where a creditor enters into a second contract, there must be a clear, cogent and unequivocal proof of novation.”

[19] As I understand it, the question is one of intention and that, in the absence of any express declaration of the parties, the intention to effect a novation cannot be held to exist except by way of necessary inference from all the circumstances of the case[2]. It will naturally depend on the facts of each case.

[20] In my view, the facts, history and the conduct of the parties in this matter are consistent with an intention to novate and substitute the previous agreements between them. The very existence of the out and out agreement of cession indicates a novation of the previous causa. It clearly replaced the previous obligations of Amaxibiso with a new one. The following facts lends support to this interpretation:

(a) The applicant’s attorney who had drafted the AOD, addendum and confession agreements, also drafted the agreement of cession and under the heading *“Background”* referred to those agreements all pertaining to the same debt;

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[2] *Van Coppenhagen v Van Coppenhagen* 1947 (1) SA 576 (T)

(b) The agreement states that it was the intention and effect of the cession, to divest the cedent of any entitlement to the amount subject to the cession and that the municipality will effect direct payment to the applicant, as the cessionary in respect of the amount aforesaid.

(c) The agreement of cession expressly states that it is an out and out cession and not made *in secutitatem debiti.* The agreement also makes reference to the initial credit agreement between Amaxibiso and the applicant which gave rise to the summons and AOD.

(d) It is recorded in the agreement of cession, that should the applicant not procure payment, the applicant would apply for the liquidation of Amaxibiso and the sequestration of the respondent's estate;

(e) The applicant is in possession of the roof certificates (payment certificates) to be submitted for payment by the municipality. This term was provided for in the AOD and is repeated in the agreement of cession.

[21] If my interpretation is wrong, the following also militates against granting the orders sought: The initial credit agreement was concluded between Amaxibiso and the applicant. So also was the cession agreement. The summons subsequently was issued against the respondent as a surety in terms of the AOD. The principal debt was owed by Amaxibiso. By entering into the agreement of cession, Amaxibiso extinguished its debt to the applicant to the extent of R1,430,057.88. The applicant has not disputed that the respondent has already paid it R530,000.00 towards the principal debt and the respondent has offered (on oath) to pay the applicant the amount of R350,000.00 with a few weeks of deposing to his answering affidavit, to which the applicant has filed no reply. The debt owed by the respondent has on these facts been extinguished.

[22] Moreover, it is trite that if a principal debtor, which in this case is Amaxibiso, pays its debt in full, the creditor is precluded from pursuing payment of the same debt against the surety. If the municipality pays the applicant in terms of the cession agreement the applicant would have been paid in full. Should a judgment by confession be granted and the respondent's home be sold in execution, the applicant stands to have been paid twice for the same debt. That would be iniquitous.

[23] In the circumstances the application is dismissed with costs.

E REVELAS
Judge of the High Court

<u>Appearances</u>:

For the applicant, Adv K D Williams instructed by Joubert Galpin & Searle, Port Elizabeth

For the respondent, Adv L Franck instructed by Ian Levitt Attorneys c/o Gouws Attorneys, Port Elizabeth

Date heard: 1 September 2016

Date delivered: 22 September 2016