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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 433/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

CIRCULATE TO MAGISTRATES: NO

In the matter between:

NEDBANK LIMITED

APPLICANT

And

JERSEY ADVERTISING CC

1st RESPONDENT

HELEN TERRY REES

2nd RESPONDENT

CORAM:

KHOOE AJ

HEARD ON:

17 NOVEMBER 2022

ORDERS GRANTED ON:

18 NOVEMBER 2022

REASONS HANDED DOWN ON:

4 August 2023

This reasons were handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 16h00 on 4 August 2023.

REASONS

INTRODUCTION

[1] On 18 November 2022, after having heard an opposed application, I issued the following orders:

"1. The respondents shall take all necessary steps to fully comply with their full obligations in terms of the settlement order handed down by the Honourable Acting Judge Snellenburg on 20 September 2018 in particular the following:

2. In respect of account number 848[...] (Aqua View), the second respondent shall sign all mandates needed to enable the applicant's sales division to market and sell the property;

3. In respect of 1.1 above, the second respondent shall update the mandate should it expire before the said property is sold and to keep updating the mandate until the property is successfully sold;

4. The applicant shall ensure that its sales division is always in contact with second respondent in order to enable the successful sale of property Aqua View:

5. In respect of account 800[...] ([...]7/[...]9 Aqua View), the respondent shall bring the account up to date by paying arrears owed on this account.

Each party pay its own costs."

[2] Insofar as the reasons are handed down some time after the granting of the order, I place on record that it was the end of term and I unfortunately

encountered a persistent health issue which led me to delaying most of my reserved judgments and having gone back to my practice at the beginning of the following term, the terms overlapped with my practice.

II THE PARTIES

[3] The applicant is Nedbank Limited, represented by Adv S Reinders, instructed by Cliffe Dekker Hofmeyer INC c/o Webbers Attorneys Bloemfontein.

[4] The 1st respondent is Jersey Advertising CC, represented by Adv LA Roux, instructed by JNS Attorneys c/o Spangenberg Zietsman & Bloem, Bloemfontein.

[5] The 2nd respondent is Helen Terry Rees, sole director of the 1st respondent, also represented by Adv Roux.

III THE LITIGATION HISTORY AND RELIEF CLAIMED

[6] The applicant instituted action against the respondents in this court under case number 433/2016.¹

[7] On 4 June 2018, the action between the parties was settled and a written settlement agreement signed by all parties involved, was made an order of court. Of importance is the intention of the settlement agreement, which for all intents and purposes was to resolve issues between them as articulated in the pleadings that were filed, and put an end to the claims and counterclaims against each other.²

[8] In terms of the settlement agreement, which I quote *verbatim*:³

¹ Founding affidavit: para 9.

² Founding affidavit: para 8-32.

³ Page 26-27, paras 8.1-12, annexure KP2

"the property situated at 1[...] Aqua View Street, Deneysville- property bonded under loan number 848[...] will as soon as reasonably possible be placed in the open market with the view on selling the property as expeditiously as possible. The Defendants will also after property has been on the market for two months, and has not been sold yet, immediately be in contact with the Plaintiffs assisted sale division and sign all mandates needed to enable the Plaintiffs assisted sale division to assist with the sale of this property;

Property situated at 1[...] Cherry Grove, Dullstroom- property bonded under account number 813[...] - the defendants agree to immediately place this property with estate agents in the open market for a period of two months, and thereafter to place this property with the plaintiffs assisted sale division and complete all such forms and such mandates to enable the Plaintiff to assist in the selling of this property;

The property [...]7 and [...]9 Aqua View Street, Deneysville- property bonded under account number 800[...] - it is recorded that as a result of recent tornado to hit Deneysville area, there is some remedial work to be effected to this property. In event that the remedial work is not commenced within two months from date hereof, the Defendants will service the bond from the 1st day of the next month;

The Plaintiff will circulate copies of the settlement agreement to its various attorneys of record with regards to the other two matters against the first and second defendants under the following case numbers: Free State High Court, Bloemfontein- case number 5676/2016. Free Sate High Court Bloemfontein- case number 184/2016 and Gauteng High Court, Pretoria Division- case number 55278/16;

The parties agreed that the above matters will be pended until all the properties have been sold as listed above, whereafter a reconciliation will be done of all bond and loan accounts of the Defendants, to calculate

what amounts remains outstanding by the defendant or Defendants towards the Plaintiff. This paragraph does not detract from or amend in any way the contents of paragraph 8.3.

Each party to pay its own legal costs."

[9] On 23 October 2020, the Plaintiff filed a contempt of court order application of the Honourable Acting Judge Snellenburg where the following orders were sought, which I also quote *verbatim*;

9.1 "Declaring that the Respondents are in contempt of the order (the settlement order) handed down by the Honourable Acting Judge Snellenburg on 20 September 2018.

9.2 Directing the Respondents to fully comply with their obligations in terms of the settlement order, and in particular to do the following:

9.2.1 The Second Respondent: in respect of account number 848[...] (1[...] Aqua View), to sign all mandates needed to enable the Applicant's Assisted Sales Division to market and sell the property;

9.2.2 In respect of account number 813[...] (1[...] Cherry Grove), to pay the Applicant, by no later than 30 days after granting of this order, the amount of R 405 208.26 plus interest thereon at the rate of[~] from the date of the order to final payment;

9.2.3 The First Respondent must in respect of account number 800[...] ([...]7 and [...]9 Aqua View) to pay to the Applicant the amount of 675 973.17, being the amount of accumulated arrears up to and including 1 August 2020, together with interest thereon at the rate applicable in terms of relevant agreement, by no later than 30 days after the granting of this order; and

9.2.4 Thereafter, and only a monthly basis, continuing to service the bond of the property situated in [...]7 and [...]9 Aqua view Street, Deneysville, mortgaged to the Applicant under mortgage number account 800[...].

9.3 Committing the Second Respondent for contempt of court and directing that she be imprisoned until the Respondents have complied fully with their obligations in terms of the settlement order;

9.4 Directing the Respondents to take all such steps, including the timeous passing of resolutions and timeous submission of applications for approvals and/or other registrations, as shall be necessary and/or reasonably required to conclude, execute and/or implement the agreements as well as the transactions contemplated in the settlement order;

9.5 Directing and authorising the Sheriff of the court, should the Respondents fail and/or refuse to diligently or timeously take any of the steps required to be taken in terms of paragraph 9.4 above, to take all such steps as the Respondents may have failed to either diligently or timeously take, on behalf of or in substitution of the Respondents. The Sheriff of the Court shall be indemnified against any loss or damage that any party may suffer as a result of any act or omission of the Sheriff of the Court pursuant to this order. It also needs to be pointed out that the applicant filed an amended notice of motion during the course of the litigation." ⁴

[10] On 8 September 2022, the Plaintiff brought an interlocutory application, which served before me, seeking an amendment of the Notice of Motion to include the following prayer;

"The First Respondent in respect of account 800[...] ([...]7 and [...]9

⁴ Notice of motion, pages 1-3

Aqua View) to sign all mandates needed to enable the Applicant's assisted Sales Division to market and sell the property"⁵

[11] I granted the application for amendment and gave leave to submit further affidavits.

IV THE APPLICANT'S CASE

[12] During the hearing of the main application, Mr Reinders for the Applicant, informed me that the Applicant had abandoned the contempt of court prayers and was only moving for specific performance regarding the obligations in the settlement agreement. He submitted that:

12.1 that it had been 4 (four) years since the settlement agreement was made an order of court and still the Respondents had not acted toward the fulfilment of the settlement agreement. Other than the property 1[...] Cherry Gove, Dullstroom being sold, the First Respondent still owed an amount of R 405 208.26. The Respondents' argument that on the strength of the provision of the settlement agreement, which stated that the matters will be pended until all properties have been sold and reconciliation be done on all bond accounts to calculate what amount remains outstanding; could never have contemplated between the parties that the Respondents would not fulfil their end of the bargain and frustrate the fulfilment of what was contemplated in the settlement agreement.

12.2 the intention of the parties in entering the agreement was to make sure that the property in 1[...] Aqua View be sold, and the property [...]7 and [...]9 Aqua View be serviced, alternatively also be sold. In support of this submission, I was referred to **Luwala v Port Nolloth Municipality**⁶ where **Berman J** said the following;

"Such a prayer can be invoked to justify or entitle a party to an order

⁵ Interlocutory Notice of Motion, page 1, para 1

⁶ 1991 (3) SA 98 (C) at 112D-E

in terms other than that set out in the notice of motion (or summons or declaration) where that order is clearly indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers (or is given), cf Trustees of the Orange River Land and Asbestos Co v King and others HCG 260 at 296-297. Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefor has been fully canvased, viz the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of further and/or alternative relief."

12.3 It was further submitted that, because the properties had not been dealt with for 4 years, the other cases were left hanging. It is therefore important for the court to intervene to break the stalemate as the matters could not be held in abeyance forever.

12.4 The argument was that the Respondent's obligation is to renew the mandate each time it expired. If this is not plain from the settlement agreement, it ought to be clear from the settlement agreement read and interpreted sensibly, applying the well established principles of interpretation.

12.5 In Natal Joint Municipal Pension Fund v Endumeni Municipality,⁷ the court said that;

"interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provisions in the light of the document as a whole and the circumstances attendant upon its coming into

⁷ 2012 (4) SA 593, para 18

existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production."

V THE DEFENCES

[13] The respondents' submissions are summarised as follows:

13.1 the Respondents had acted in terms of the settlement agreement, therefore they could not be held in contempt;

13.2 that on the papers, it is not denied that the Second respondent signed the mandate as ordered by the court in relation to property 1[...] Aqua View, and that even after the first mandate expired, she approached the Plaintiff to sign a fresh mandate but was informed that she could not do that, she would be referred back to the Plaintiff's legal division;⁸

13.3 that it is not disputed on the papers that property [...]7 and [...]9 Aqua View had repair work done and the Respondents had made no less than twenty six (26) payments totalling R431 000.00;⁹

13.4 with reference to the specific performance, the Respondents argued that clarification on specific performance had to be made. Mr Roux argued that the Respondents had acted in terms of the settlement agreement, but what the Applicant was now moving for regarding property [...]7 and [...]9 Aqua View, was not part of the settlement agreement nor the Notice of Motion;

13.5 Mr Roux argued that if the court order is considered objectively and

⁸ Pages 71-72, annexures HTR4 and HTR6

⁹ Page 7, para 24, Respondents heads of argument.

as a whole , it is clear that this application should never has seen the light of day. He referred me to the interpretation that the SCA preferred in **Firestone South Africa (Pty) Ltd v Gentiruco AG**¹⁰ wherein it was said;

"The Court's intention is to be discerned from the language of the judgment the order has construed according to the usual well-known rules...thus, as in the case of document, the judgment order and the Court's reasons for doing it must be read as a whole to ascertain its intention."

VI THE LAW

[14] It is a well established that clauses in a contracted must be interpreted having regard to the language used in the light of the ordinary rules of grammar and syntax; in the context of the clauses being interpreted and the agreement as a whole; and taking into account the apparent purpose of the clauses so as to give the contract a commercially sensible meaning.¹¹

[15] The court in **City of Tshwane Metropolitan Municipality v Blair Athol Homeowners Association**¹² said the following;

"This court has consistently stated within the interpretation exercise that the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue. No practical purpose is served by a further debate about whether evidence by the parties about what they intended or understood the words to mean serves the purpose of properly arriving at a decision on what the parties intended as contended for by those who favour a subjective approach nor is it in juxtaposition helpful to debate the

¹⁰ 1977 (4) SA 298 (A) at 304

¹¹ Reazer CC v The Falls Supermarket (232/2017) [2017] ZASCA 166

¹² 2019 (3) SA 398 SCA para 61

correctness of the assertion that would only lead to self-serving statements by contesting parties."

VII EVALUATION OF THE EVIDENCE AND SUBMISSIONS BY THE PARTIES

[16] This matter first graced the court rolls in 2016, by that 2018 the parties knew exactly what their duties and obligations were towards each other. They captured their intentions in the settlement agreement.

[17] That agreement had to be read in totality and not in piece meal to serve the purpose of one, to the detriment of another.

[18] According to the papers before me, it is clear that the Applicant performed according to the terms of the agreement. The frustration comes with the Respondents' side of the bargain especially regarding property situated at 1[...] Aqua View. It has been a lengthy time that the matter has been pending and there are other court cases pending.

[19] It is apparent that the Applicant wants this matter to be dealt with expeditiously. This is clear from the steps taken from its side immediately after the court order was handed down.

[20] The only thing that bothered me about the Applicants' submission was that counsel did not address me on whether the bond at property [...]7 and [...]9 were being serviced.

[21] I agree that the request to service the bond to date was not before me, but the main question was whether at the time the application was brought, were the Respondents servicing the bond?

[22] If the answer to that question is negative, then indeed the court order was not adhered to and therefore the alternative remedy can be granted. If

the answer was in the affirmative then there was no reason to insist that the property in question be sold.

[23] Counsel for the Respondents submitted that indeed the bond on [...]7 and [...]9 Aqua View was serviced with no less than twenty six (26) payments. There is therefore no need to address to insist on the alternative prayer of sale of the property. I agree with this submission.

[24] I also agree with counsel for the Applicant that the continued delay is detrimental to the Applicant. It was submitted that even though the Second Respondent claims that she had previously signed a mandate for the sale of property 1[...] Aqua View, there was no evidence placed before me to prove that it had reached the Applicant. This was particularly concerning. It strengthens the Applicant's version that Respondents were intentionally stalling the sale of the property.

[25] In order to break the stalemate, a decision had to be taken that would ensure that the spirit of the settlement agreement was kept intact.

VIII CONCLUSION

[26] I conclude therefore, that in order to break the stalemate my order of 18 November 2022, captured in paragraph supra, were just and fair. The Applicant has made out a case for specific performance, I however did not grant an order for costs as the applicant abandoned the contempt of court prayers and made no attempt towards the amendment they had sought.

NJ KHOOE, AJ

On behalf of Applicant

Instructed by

Adv S Reinders

Cliffe Dekker Hofmeyer INC

c/o Webbers Attorneys

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