



IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA,
PRETORIA

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

14 February 2017

In the matter between: -

CASE NO.: 2010/53126

14/2/2017

ARTHUR PETER PEDLAR

FIRST APPLICANT

SANDRA JOANNA PEDLAR

SECOND APPLICANT

And

FIRST RAND BANK LIMITED

FIRST RESPONDENT

CHRISTIAN VAN HEERDEN N.O

SECOND RESPONDENT

CRISTEL STEYN N.O

THIRD RESPONDENT

REACHOUT TRUST AND LEGAL (PTY) LTD

FOURTH RESPONDENT

JUDGMENT

TSATSAWANE AJ

Introduction

1 The applicant seeks an order in the following terms ~

- “1. *Setting aside the order granted on 21 June 2011.*
2. *An order declaring void and setting aside the power of attorney dated 20 June 2011.*
3. *Setting aside any sales pursuant to the power of attorney dated 20 June 2011.”*

2 In the event that they are successful, the applicants seek a costs order against those opposing the relief which they seek.

3 In September 2010, the first respondent (“the bank”) issued summons against the applicants for payment of an amount of R2 369 336,94 being monies lent and advanced by the bank to the first applicant in terms of a loan agreement. As security for the loan, a mortgage bond was registered in favour of the bank over the “*Remaining Extent of Holding 53 Raslouw Agricultural Holdings, Registration Division J.R., Province of Gauteng*” (“the property”). The property is the applicants’ primary residence.

- 4 In addition to the aforesaid security, the second applicant executed a deed of suretyship in terms of which she bound herself as surety and co-principal debtor for the due and punctual performance of the first applicant's obligations towards the bank in terms of the aforesaid loan agreement. The bank's claim against the second applicant was based on this deed of suretyship.
- 5 The applicants' claim that they were initially not aware of the bank's summons due to the fact that the summons was not personally served upon them. They do not, however, seriously rely on this issue for purposes of the relief which they seek. In any event, they did become aware of the action proceedings before the order sought to be set aside was granted.

The settlement agreement

- 6 On 20 June 2011, the applicants and the bank concluded a settlement agreement with the intention to settle the bank's aforesaid claim ("the settlement agreement").
- 7 In terms of the settlement agreement, the parties, i.e. the bank and the applicants, agreed as follows ~

"(a) The First Defendant will make payment to the Plaintiff of an amount of R30 000,00 per month from the 30th of June 2011;

- (b) *Should however the normal instalment of the facility agreement surpasses the amount of R30 000,00, the First Defendant will then pay the normal instalment;*
- (c) *The arrangement in terms of this settlement agreement will be reviewed every six months from 30 June 2011;*
- (d) *The First Defendant will sign a Special Power of Attorney in favour of the Plaintiff in respect of the abovementioned immovable property;*
- (e) *The First and Second Defendant will sign Authority to Debit Legal Fees;*
- (f) *That this settlement agreement is made an order of this Court;*
- (g) *That the Summary Judgment is postponed sine die;*
- (h) *That should the First Defendant and/or Second Defendant fail to comply with this settlement agreement, the Plaintiff will be entitled to Summary Judgment."*

8 On the same day that the parties concluded the settlement agreement, the first applicant executed a special power of attorney in terms of which he irrevocably nominated, constituted and appointed the bank, amongst others, to "*sell the property by way of private treaty or public auction...*" The special power of attorney is attached to the settlement agreement.

9 The special power of attorney and the settlement agreement do not mention the circumstances under which the bank would be entitled to sell the property. When regard is had to the context in which the power of attorney was executed and given to the bank, it cannot be that the bank became entitled to sell the property at any time and for whatever reason it deemed fit. There is no evidence to support such a conclusion. Of importance, there is no evidence to support the conclusion that the first applicant granted the special power of attorney to sell the property even if he was not in default of the settlement agreement. In the event of default, the settlement agreement provides a remedy to which the bank shall be entitled, and such remedy is not to sell the property – it is to seek summary judgment.

10 On 21 June 2011, the day after the settlement agreement and special power of attorney were executed, the settlement agreement was made an order of this Court. It is this order which the applicants seek to set aside. It is important to note that the order does not authorise the execution of the property.

The basis of the application

11 The Court order which is sought to be set aside simply reads as follows ~

“THAT the Settlement Agreement between the parties filed of record and marked “X” be and is hereby made an order of Court.”

- 12 The above being the case, it means that the Court order is what is set out in the settlement agreement. Accordingly, I must have regard to the contents of the settlement agreement, which is the Court order, to determine whether the bank was entitled to sell the property.
- 13 Before the settlement agreement was concluded, there were summary judgment proceedings pending between the parties in which the bank sought the relief sought by it in its summons. Such relief included an order declaring the property executable (as set out in paragraph 3 of the notice of application for summary judgment).
- 14 In paragraph (g) of the settlement agreement, the bank agreed that "*the Summary Judgment is postponed sine die.*" The applicants also concluded the settlement agreement on that basis – and of importance, on the basis that the Court was not going to be asked to declare the property executable. On 21 July 2011 when the matter came to Court, the bank did not seek the relief sought in the notice of summary judgment application – it sought an order and was granted an order in terms of which the settlement agreement was made an order of Court.
- 15 In their founding affidavit, the applicants based their application on the grounds that ~
- 15.1 the settlement agreement was negotiated in bad faith in an attempt to avoid compliance with the Practice Manual of this Court;

- 15.2 the settlement agreement was prepared under "*the threat of execution and eviction*";
- 15.3 their attention was never drawn to the provisions of section 26(1) of the Constitution;
- 15.4 they were not informed or placed in a position to place relevant circumstances within the meaning of section 26(3) of the Constitution and Rule 46(1) of the Uniform Rules of Court;
- 15.5 the settlement agreement constitutes a novation of the bank's claim and constitutes a fresh agreement;
- 15.6 the special power of attorney constitutes *paratie executie*.
- 16 The correspondence between the first applicant and the bank's representatives show that the settlement agreement was freely and voluntarily negotiated between the parties. The bank may have taken a hardline approach in the negotiations in trying to reach a settlement which was most favourable to it even though such may have been too onerous to the applicants. This, however, is not unlawful and does not constitute a ground to grant the relief which the applicants seek.
- 17 In a letter dated 15 June 2011, a few days before the settlement agreement was concluded and made an order of Court, the applicants, though their attorneys advised the bank that ~

"It is our instructions to settle this matter in that a payment of R30 000,00, all inclusive, per month, be made, paid directly to RMB.

It is further our instructions that our client will accept that the settlement be made an order of Court on the 21st and that the application be postponed sine die."

18 The applicants do not deny that they instructed their attorneys to advise the bank in the manner quoted above. The applicants also do not deny that they signed the settlement agreement at the offices of their attorneys as alleged by the bank. In the premises, I reject the applicants' suggestion that they were pressurised to conclude the settlement agreement and that the settlement was negotiated in bad faith. There is simply no sufficient evidence placed before me to reach that conclusion. In fact, the evidence before me shows that the parties and their respective attorneys engaged with each other over a period of time culminating in the above quoted letter of 15 June 2011 and there is no allegation of duress by the applicants.

19 The Court order does not authorise the execution of the property. The order to declare the property especially executable is sought in the summary judgment application which was postponed *sine die* and was not granted. For this reason, the applicants' contentions that they were not given an opportunity to place their relevant circumstances before the Court as contemplated in section 26 of the Constitution are irrelevant.

- 20 The applicants also complain that the bank has disclosed the contents of their settlement discussions which were made without prejudice. There is no merit in this complaint in that a settlement agreement was eventually concluded and then made an order of Court. The bank was entitled to place evidence of the settlement negotiations before the Court to show how the settlement agreement was arrived at. The situation would have been different if a settlement agreement had not been concluded.
- 21 In the view which I have taken, it is not necessary to consider the other basis on which the relief sought is based other than the applicants' contention that the special power of attorney which they signed amounts to *paratie executie*. I consider this ground below.

Paratie executie

- 22 In paragraph 19.3 of their founding affidavit, the applicants say that the special power of attorney to sell the property amounts to *paratie executie* and that it is unlawful. It is for this reason that the applicants seek an order in terms of which the special power of attorney is set aside and the sale in execution concluded in terms thereof set aside.
- 23 In its answering affidavit, the bank says that it sold the property by way of an auction "*Due to the default of the First and/or Second Applicant and in term of the settlement agreement and by virtue of the special power of attorney...*"

Accordingly, the bank's position is that a default under the settlement agreement (the Court order) entitled it to sell the property. I do not agree.

- 24 The bank did not first obtain a Court order declaring the property executable before selling the property by way of an auction. It by itself considered that there was a default of the Court order sufficient to justify it to sell the property. Of importance, it concluded that a default under the settlement agreement (Court order) entitled it to sell the property.
- 25 The Court order does not say as to when and under what circumstances the bank would be entitled to act in terms of the special power of attorney. The bank cannot therefore take it upon itself that it could act in terms of the power of attorney at any time and under circumstances determined by it because the Court order does not say so.
- 26 There is nothing in the Court order to suggest that whenever there is a default, regardless of the amount by which the applicants are in default and regardless of where the applicants go after the sale of the property which is their primary residence, the bank is entitled to sell the property. I certainly cannot read that into the Court order.
- 27 Paragraph (h) of the Court order provides a different remedy in the event of default. It says that ~

"That should the First Defendant and/or Second Defendant fail to comply with this settlement agreement, the Plaintiff will be entitled to Summary Judgment."

- 28 There is nothing in the above quoted paragraph (h) to suggest that the bank would be entitled to both summary judgment and execution of the property in the event of default. There is only one remedy available to the bank and it is a summary judgment. It is not the bank's case that it obtained summary judgment before selling the property by way of an auction.
- 29 For the reasons best known to the bank, it agreed to postpone the summary judgment application *sine die*. That application remains pending in this Court. In my view, it is for this reason (that the summary judgment application was postponed) that the Court made an order in terms of which it provided that the bank shall be entitled to summary judgment in the event of a default which would require the bank to come back before the Court and make out a case for the relief which it might be advised to seek, obviously with the applicants being entitled to be heard before such an order is made.
- 30 The bank's contention in paragraph 8.3 of its heads of argument that the applicants voluntarily provided it with authority to execute upon the property "*should they default in terms of the settlement agreement*" is accordingly wrong. The settlement agreement clearly says that the bank shall be entitled to summary judgment in the event of a default and not execution of the property (without judicial supervision). There is no reason why the Court would have made provision for the bank to come back to it for summary judgment if at the same

time the Court authorised the sale of the property without any reference to it. It clearly did not do so.

- 31 In De Beer v Keyser and Others 2002 (1) SA 827 (SCA) at 838 paragraph 26, it was held that ~

“[26] ... *paratie executie occurs where a creditor has the right to sell the property of a debtor in satisfaction of a debt. The principal objection to the practice is that without judicial control the property might be sold by the creditor on terms that are unduly prejudicial to the debtor ...*”

- 32 In this case, the Court order does not say that the bank is entitled to sell the property in the event of default. The special power of attorney also does not say this. The Court order says that the bank shall be entitled to summary judgment in the event of non-compliance – and nothing more.

- 33 In Bock and Others v Duburoro Investments (Pty) Ltd 2004 (2) SA 242 (SCA) to which the bank referred me, the Court was dealing with facts which are different from the facts of this case. In any event, at paragraph 7 of the judgment, the court restated the legal position that it is after default that a mortgagor may grant the bondholder the necessary authority to realise the bonded property. In this case, the purported authority was in fact given before the default, i.e. on the very same date that the parties concluded the settlement agreement and signed the

special power of attorney. There was no default in terms of the settlement agreement on the date on which it was concluded.

- 34 Furthermore, the bank did not in any event purport to act in terms of the original security (mortgage bond) – because it did not make provision for the sale of the property without judicial supervision as was the case in *Duburoro* where the creditor relied on a pledge and did not in fact “*exercise its right of paratie executie*” but took over the shares in issue relying on a separate agreement contemplated in the pledge which made provision for the shares in issue to be taken over at a fair price – to which fair price the debtor agreed. Accordingly, *Dubororo* does not support the bank’s case on the facts before me.

- 35 Pursuant to the special power of attorney, the bank sold the property to Mama Mia Trust which is represented herein by the second, third and fourth respondents. It is this sale which the applicants seek to set aside on the basis that the power of attorney in terms of which the sale was concluded is unlawful as stated above. When regard is had to the basis on which the bank says it sold the property, i.e. that the applicants were in default of the settlement agreement, it is not necessary to decide whether the power of attorney is valid. This is so due to the fact that the basis on which the bank says it sold the property is wrong in law for the reason stated above, i.e. that the applicants’ default did not entitle it to sell the property – their default entitled it to summary judgment, the proceedings of which it postponed *sine die*.

36 In the light of the above, I am of the view that the bank was not in law entitled and competent to sell the property as it did. In the event that there was a default in terms of the Court order (settlement agreement) the bank ought to have applied for summary judgment, this being the remedy provided for in the Court order (settlement agreement) which it asked the Court to give it when it moved the Court to make the settlement agreement an order of Court on 21 June 2011.

37 In the premises, the bank cannot act contrary to what is provided for in the Court order.

Costs

38 The applicants have not made out a proper case for the Court order granted on 21 June 2011 to be set aside. The bank came to Court to oppose the setting aside of the Court order. The bank has been successful in opposing the setting aside of the Court order.

39 Insofar as the bank was only entitled to obtain summary judgment in the event of there being a default in terms of the Court order (settlement agreement), it therefore follows that the sale of the property by the bank cannot stand. In this regard, the applicants have been successful.

40 The second, third and fourth respondents also came to Court to oppose the setting aside of the order granted on 21 June 2011 and the sale of the property to them. In my view, they were entitled to come to Court to present their case in

this regard and I am of the view that they ought not to be mulcted in costs. No case has been made to the effect that their opposition of this application was unnecessary or unreasonable.

41 For the reasons stated above, the following order is made ~

41.1 the sale of the property described as the Remaining Extent of Holding 53 Raslouw Agricultural Holdings, Registration Division J.R. Province of Gauteng by the First Rand Bank Limited to Mamma Mia Trust on 25 February 2015, is set aside;

41.2 the costs of this application shall be paid by the applicants.



Kennedy Tsatsawane

Acting Judge of the Gauteng Division of the High Court of South Africa, Pretoria.