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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 13259/2009

In the matter between:

THIREN NAIDOO	**APPLICANT**
and	
ABSA BANK LIMITED	**FIRST RESPONDENT**
JAMEEL ADAMS	**SECOND RESPONDENT**
NM VANKER	**THIRD RESPONDENT**

JUDGMENT

SISHI J

Introduction

[1] In this application the Applicant seeks an order in the following terms:

1. That the sale in execution of the immovable property, Flat 4, Furnrich, 27 Furness Avenue, Berea, Durban to the Second and Third Respondents be set aside.

2. That any transfer of the immovable property, Flat 4, Furnrich, 27 Furness Avenue to the Second and/or Third Respondents resulting from any sale in execution be set aside.

3. That the First Respondent is to provide the Applicant with a detailed written statement of the bond account, from inception to date of the order, showing:

   (a) All amounts debited to the bond and the reason therefor.

   (b) All amounts credited to the bond account and the reason therefor.

   (c) Any arrears which is to exclude all legal fees from inception of the bond to date.

   (d) Monthly bond statements from May 2011 to date of Court order.

4. That the First Respondent be held in contempt of the Court Order of 22 May 2012 under case number 13259/2009 out of this Honourable Court.

5. That the First Respondent pays the costs of this application on an attorney client scale.

6. That all those who oppose this application pay the costs of this application on an attorney client scale.

[2] The First Respondent is opposing the application and the Second and Third Respondents have indicated that they are not opposing the application.

Background

[3] The First Respondent granted to the Applicant the loan for the purposes of acquiring an immovable property. This is the same immovable property of which the

mortgage bond was passed and to which the relief under paragraph 1 and 2 of the Notice of Motion relates.

[4] The First Respondent foreclosed on the bond in 2009. The First Respondent brought an application to declare the property specially executable which litigation culminated in a court order by agreement on 22 May 2012. (This order comprises annexure "A" to the Applicant's Founding Affidavit).

[5] The terms of the court order referred to above are central to this application. In brief, they provide for the property to be declared executable and that the Applicant was to repay the accumulated arrears, in full, upon or before the 22 May 2013 in instalments, and that in the event that he was to once fall into arrears and having been given three days' notice and failing to remedy the breach, then the First Respondent can execute against the property without further notice.

[6] The attorneys of record for the First Respondent in the action, and all applications including the application under case number 13259/2010, were Pearce, Du Toit and Moodie Attorneys.

The Court Order

[7] It would be appropriate at this stage to set out fully the terms of a said court order:

> It is ordered
>
> That the parties agree as follows:
>
> 1. An order is granted in terms of paragraph 1 of the Application to declare immovable property executable dated 31 October 2011.

2. That the Applicant undertakes not to execute on the immovable property on the following conditions, namely:-

    2.1 The Respondent undertakes to pay the sum of R9194.00 (nine thousand, one hundred and ninety four rand) per month into the Respondent's bond account held with the Applicant, which amount constitutes a payment towards the arrears and the monthly bond instalment.

    2.2 The aforesaid payment will commence on 1 June 2012 and shall continue until 31 May 2013, thereafter, the Respondent will continue to pay the normal bond instalment;

    2.3 The full balance of the arrears must be paid on or before 22 May 2013.

3. In the event that the Respondent fails to comply with any one of the aforesaid undertakings in paragraph 2.1, 2.2 and 2.3, the Applicant shall forward a notice to the Respondent's attorneys of record, THEYAGARAJ CHETTY ATTORNEYS a email theyagaraj@telkomsa.net to remedy the breach within 3 (three) days, failing which the Applicant may execute against the property for the full balance outstanding, including arrears and costs. The original judgment debt."

The Issues

[8] Two main issues arise in this matter; the first is whether a proper breach notice was sent by the First Respondent to the Applicant or his attorney. The second issue is whether the parties complied with the terms of the court order.

Applicant's contentions

[9] The Applicant contends that he paid two amounts of R3000 each into the First Respondent's account on 29 September 2014. On the 1 October 2014 Strauss Daly Attorneys sent an email to the Applicant's attorneys advising that they have taken over the file from Pearce, Du Toit and Moodie Attorneys and further advised the Applicant that he was in arrears in the amount of R16 131.34 and that such amount should be paid within three days, failing which, the First Respondent would proceed to execute against the property.

[10] The Applicant contends that Pearce, Du Toit and Moodie Attorneys were still the First Respondent's attorneys of record on 1 October 2014. The Applicant contends that a further R10 000 in cash was paid within three days of receiving the alleged breach notice. The Applicant claims to have paid the total amount of R16 500 by the 3 October 2014. The Applicant further contends that the First Respondent has not substantiated that the arrears were indeed R16 131.34. The breach notice also does not state from when the arrears were calculated. The First Respondent also did not send him any statements of the bond account.

[11] The terms of the court order dated 22 May 2012 are clear and unambiguous. In terms of clause 2 thereof, the First Respondent undertook not to proceed against the property provided that the Applicant paid the arrears on a regular basis and paid the full balance of the arrears upon or before the 22 May 2013.

[12] Clause 3 of the said court order deals with the event wherein the Applicant is in breach of clause 2. This clause requires the First Respondent in the event of breach, to send the notice of breach to the Applicant's attorney of record Theyagaraj Chetty Attorneys at the email given in paragraph 3 of the court order, to remedy the breach within three days, failing which the First Respondent may execute against the property for the full balance outstanding, including arrears and costs.

[13] The Applicant contends that he complied with all the obligations set out in the court order. The First Respondent contends that the Applicant did not comply with the obligations set out in the court order.

[14] The Applicant further contends that the First Respondent did not comply with the court order before selling the immovable property in that no breach notice was sent by the First respondent as a prerequisite to any execution proceedings in terms of paragraph 3 of the said court order.

[15] Counsel for the Applicant submitted that if the Applicant was in arrears at any given time a notice of breach had to be sent by the First Respondent to the Applicant requiring him to remedy the shortfall within three days. Any notice of breach had to be sent by Absa Bank or its attorneys to the Applicant. Counsel then submitted that the Respondent's attorneys of record in this matter were at the time Pearce, Du Toit and Moodie Attorneys and not Strauss Daly, the attorneys that allegedly sent the breach notice. He submitted that the letter dated 1 October 2014 which is annexure 'C' to the Applicant's founding affidavit, does not state that Strauss Daly Attorneys acts on behalf of and are instructed by the First Respondent to send out the breach notice. On the contrary, Strauss Daly Attorneys state that they have taken over the file from Pearce, Du Toit and Moodie Attorneys. He further submits that Strauss Daly Attorneys did not even state who their client is in the letter.

First Respondent's contentions

[16] The First Respondent on the other hand contends that Strauss Daly Incorporated were instructed to send the notification and did so in compliance with the court order. Counsel for the Applicant contended that there is no confirmatory affidavit from Strauss Daly to state that they were instructed to send out the notice of breach and what the amount of the breach was. He further submitted that there is no affidavit from Pearce, Du Toit and Moodie Attorneys to confirm that Strauss Daly

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Attorneys have taken over the file and furthermore the notice of withdrawal and substitution as attorneys of record wherein Pearce, Du Toit and Moodie Attorneys withdrew as attorneys of record and Strauss Daly Attorneys took over was served on the Applicant's attorneys on 16 September 2015, a year after the alleged breach notice was sent. He submitted that the Applicant was quiet entitled to ignore the breach notice as it was not from the First Respondent or the First Respondent's authorised representatives which the Applicant was aware of.

The Notice of Breach

[17] It would be convenience at this stage to set out fully the contents of the notice of breach dated 1 October 2014. It reads as follows:

> "Dear Sirs
>
> The above matter refers.
>
> Kindly note that we have taken over this file from Pearce, Du Toit and Moodie Attorneys.
>
> We attach hereto a copy of a Court order dated 22 May 2013. In tenns of which you will notice that your client is in breach thereof.
>
> In terms of clause 3, we hereby give notice that unless the arrears in the sum of R16161.34 is settled within 3 days of date hereof, our clients' instructions are to proceed and obtain a sale date.
>
> We trust the same will not be necessary."

Evaluation

[18] This email was written by Brenda Chetty of Strauss Daly Attomeys and is addressed to the email address of the Applicant's attomeys of record as set out in clause 3 of the court order. The subject matter is clearly stated in the notice as

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Absa Bank v Naidoo T... Case no: 13259/2009. It is in the letterhead of Strauss Daly Attorneys.

[19] It is not in dispute that the Applicant's attorney and the Applicant received this said email. The contents of the email are clear and unambiguous. There is also no indication on the papers that the Applicant's attorneys or the Applicant himself ever queried the contents of this notice from who the notice emanated from prior to the institution of this application or at any stage thereafter.

[20] Furthermore, the Applicant's case in this matter is that he actually complied with paragraph 2 of the said court order after receiving the said notice. The submission on behalf of the Applicant that he was entitled to ignore the breach notice does not make sense and is flawed.

[21] The last paragraph of this letter dated 1 October 2014 clearly states:

> "In terms of clause 3, we hereby give you notice that unless the arrears in the sum of R16 161.34 is settled within 3 days of date hereof, our client instructs us to proceed and obtain a sale date."

The Applicant's attorney and/or Applicant could not have been mistaken as to who the client referred to in this email was. The parties are clearly cited in the said email and the case number is also cited in this notice. Therefore any suggestion that no proper breach notice was given or that it should have been given by the bank itself or Pearce, Du Toit and Moodie Attorneys is to put form before substance.

[22] I am satisfied that a proper breach notice was given to the Applicant as required by clause 3 of the court order.

[23] The next issue is whether the parties complied with the terms of the court order.

[24] In terms of the email dated 1 October 2014, the Applicant was given notice to pay the amount of R16 161.34 within three days, failing which the First Respondent would proceed to execute against the property.

[25] On the Applicant's own version from the papers, he made some payments after receipt of the said notice. He alleges that he paid R16 500 after receipt of the notice. But if one looks at the schedule which he himself has put up (annexure 'B' on page 18 of the papers), he paid three amounts (R2 000; R500, and R8 000 totalling R10 500). It is also clear from the papers that the Applicant paid two amounts of R3 000 on 29 September 2014. But these two payments of R3000 each preceded the demand which was given on 1 October 2014. When the First Respondent failed to receive the R16 161.34 by the 3 October 2014, it proceeded to sell the property at the sale in execution. It was at that sale in execution that the Second and Third Respondents bought the said property. It is therefore entirely incorrect, as counsel for the First Respondent contended, that the Applicant complied with the notice of breach by paying R16 500. This is corroborated by the First Respondent's records of all the transactions on the relevant bond account comprising annexure 'A' to the First Respondent's answering affidavit.

[26] It is clear that the Applicant only paid R10 500 within three days. He then seems to include previous payments in his computation of how he arrived at the figure of R16 500.

The Applicant failed to comply with clauses 2 and 3 of the court order.

[27] Considering all the above, I am satisfied that the Applicant has failed to make out a case for the setting aside of the sale in execution and for the setting aside or stopping the subsequent transfer of the property in question.

Furnishing of statements of the bond account

[28] In respect of prayer 3, i.e. dealing with the furnishing of bond statements, counsel for the First Respondent submitted, correctly in my view, that there is nothing on the papers suggesting that the Applicant or his attorney at any stage requested copies of the bank statement and that those were refused.

[29] Accordingly, a case has not been made out for the grant of the relief sought in prayers 3 of the notice of motion.

Contempt of court

[30] Although counsel for the Applicant indicated that he is no longer pursuing the prayer relating to contempt of court, it is evident from the papers that there are no allegation in the founding affidavit supporting prayer 4 i.e. contempt of court. In respect of the contempt of court he submitted that there is not one averment in the founding affidavit alleging that the First Respondent is guilty of any criminal conduct.

[31] In *Wightman Trading as JW Construction v Headfour (Pty) Ltd and Another*[1] the court held:

[1] 2008 (3) SA 371 (SCA)

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of a averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied...."

[32] In *AM Moolla Group Ltd and Others* v *The Gap Incorporated and Others,*[2] the Supreme Court of Appeal held:

"Affidavits in application proceedings must do more than make bald allegations; they must, in addition, provide the facts that supports the allegations...."

[33] Referring to the two cases above, counsel for the First Respondent submitted that indeed there are no allegations in support of prayer 4 (contempt of court) of the notice of motion. He then submitted that Applicant's application should be dismissed.

[34] The Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma*[3] stated:

[2] 2005 (6) SA 568 (SCA) 585 C-D
[3] 2009 (2) SA 277 (SCA) at para 26

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> "Motion proceedings, unless concerned with interim relief, are all about resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual because they are not designed to determine probabilities."

[35] It is well established under the *Plascon Evans*[4] rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the Applicant's affidavit, which have been admitted by the Respondent, together with facts alleged by the latter, justify such order.

[36] In *Zuma* (supra), the court went on to state that the position may be different if the Respondent's version consist of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible or far-fetched or so clearly untenable that the court is justified in rejecting them merely on papers.

[37] In the instant matter there are no allegations at all in support of prayer 4 (contempt of court) of the notice of motion. There is nothing in the founding affidavit to sustain this prayer. This prayer can therefore not be granted.

Costs

[38] On the issue of costs he submitted that the application should be dismissed with a punitive costs order. He submitted that the allegations made with regard to contempt of court have been made recklessly and warrant that a punitive costs order be made in these circumstances. Counsel for the Applicant also submitted that the Applicant should be granted the relief as prayed in the notice of motion and that the First Respondent should be ordered to pay punitive costs in this matter.

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[4] *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (SCA) para 26

[39] Having considered the submissions on the issue of costs, I am satisfied that this is not a matter warranting a punitive costs order. In the result I am satisfied that the costs should follow the result on the ordinary scale.

Order

1. The Applicant's application is dismissed with costs.

SISHI J

COUNSEL

Counsel for the Applicant Instructing Attorneys	: :	Mr T Chetty Theyagaraj Chetty Attorneys 296 Randles Road Sydenham Durban
Counsel for the Applicant Instructing Attorneys	:	Adv AD Collingwood Strauss Daly Inc 9th Floor, Strauss Daly Place 41 Richefond Circle Ridgeside Office Park Umhlanga Ref: V Naidu/jm/A0038/2780
Date of hearing		7 June 2016
Date of Judgment	:	17 June 2016