

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

12/2/2013

CASE No. 67029/2011

(1) REPORTABLE: NO
(2) INTEREST TO OTHER JUDGES: NO
12/2/13 DATE
 SIGNATURE

In the matter of:-

and

GROWTHPOINT PROPERTIES LIMITED

Applicant

and

MAKHONYA TECHNOLOGIES (PTY) LTD

First Respondent

MICHAEL TARUBING DZIMBANETE

Second Respondent

VENESSA NANCY ABRAHAMS

Third Respondent

JUDGMENT

Van der Byl AJ:-

[1] In this matter, launched on 7 November 2012, the Applicant seeks an order that a settlement agreement concluded between the Applicant and the three Respondents,

.../...

Annexure D to the founding affidavit, be made an order of court.

[2] As is apparent from the papers, it is not disputed -

- (a) that the Applicant and the First Respondent concluded two written agreements of lease in terms of which the Applicant rented three retail premises to the First Respondent;
- (b) that the Second and Third Respondents bound themselves in two deeds of suretyship as sureties and co-principal debtors, jointly and severally *in solidum* with the First Respondent to and in favour of the Applicant for the due and proper fulfilment of all the First Respondent's obligations in terms of and arising from the two leases;
- (c) that during the period of the two leases the First Respondent breached the two leases by failing to pay the monthly rentals, utility charges and fell in arrears in a total sum of R203 608,45 by virtue of which the Second and Third Respondents together with the First Respondent became liable to the Applicant for payment of that amount;
- (d) that a dispute arose between the Applicant and the First Respondent about the total arrear amount the First Respondent owed the Applicant;
- (e) that the dispute was eventually resolved and a written settlement agreement

.../...

(Annexure D) was concluded between the Applicant and Respondents.

[3] The relevant material and express terms of the settlement of agreement are, *inter alia*, the following, namely -

- (a) that the Respondents acknowledged to be truly and lawfully indebted to the Applicant in the total sum of R203 608,45 in respect of arrear rental and other charges provided for in the two leases;
- (b) that the Respondents would pay that amount by way of monthly instalments of R20 000, commencing on 7 July 2011 and thereafter on or before the first day of each and every month until the debt was extinguished;
- (c) that the agreement did not constitute a novation of any claim and constituted a confirmation of an existing debt;
- (d) that it was agreed by the Respondents that the agreement might be made and order of court and that the Applicant might bring an application to make the agreement an order of court on an unopposed basis.

(I may point out that the papers contain no indication whether the Respondents complied with the terms of the settlement agreement by making the payments they agreed to make as from 7 July 2011)

[4] The Respondents, however, on this application having been served on them, filed a notice in terms of Rule 6(5)(d)(iii) notifying the Applicant that they intend to raise a question of law.

[5] In terms of the notice, in so far as it was persisted with in argument at the hearing of this application, it is the contention that this Court has no jurisdiction to hear an application of this nature on the grounds thereof -

- (a) that no action or application was instituted prior to the signing of the settlement agreement;
- (b) that no *lis* existed between the parties prior to the signing of the settlement agreement;
- (c) that the Court cannot entertain an application to make the settlement agreement an order of court where no proceedings are pending between the parties, particularly, because -
 - (i) no provision is made in the Rules for such an order to be granted;
 - (ii) the Court cannot merely rubberstamp the settlement agreement where clause 11 thereof provides that it does not constitute a novation, but merely a confirmation of an existing debt.

[6] In my view the contention that no provision is made in the Rules for such an order to be made is in my view of no moment since this Court's jurisdiction is not derived from the Rules.

[7] This Court has, broadly speaking, inherent jurisdiction at common law in all matters except where such jurisdiction is excluded by statute (see: section 19 of the Supreme Court Act, 1959) and, in the absence of any jurisdictional limitations, subject to the doctrine of effectiveness (*Cilliers, Loots and Nel, Herbstein & Van Winsen : The Civil Practice of the High Courts of South Africa, p. 63*).

[8] Apart from questions relating to this Court's inherent jurisdiction, section 19 of the Supreme Court Act, 1959, a high court has jurisdiction "*in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination*". Although there is on the papers no dispute relating to the terms of the settlement agreement, the Applicant seeks an order determining a existing right the order will be binding on the Respondents who do not dispute the existence and terms of the settlement agreement (see: *Ex Parte Nell 1963 (1) SA 754 (A) at 759H*).

[9] Except for a decision in *Mansell v Mansell 1953 (3) SA 716 (N)* (to which I will refer in a moment), I was not referred to (and I was unable to find) any authority from which it appears that this Court's jurisdiction is ousted to make an order of this nature in the particular circumstances of this case.

[10] In *the Mansell case, supra*, the court held that it has no jurisdiction to make an agreement between the parties providing, *inter alia*, for the payment of maintenance to the wife an order of court because under Roman-Dutch Law an innocent wife has no right to claim maintenance after divorce,

[11] I do not regard it necessary to go into detail with the legal position relating to orders of maintenance, but the *Mansell case, supra*, is in my view of no assistance to the Respondents as it gives no guidance to the crucial issue in this matter, namely, whether this Court has jurisdiction to grant an order of this nature.

[12] It is obvious from the papers that there was indeed a dispute between the parties, albeit before any litigation was commenced between the parties relating to the amount payable to the Applicant in respect of arrear rental which dispute was settled and embodied in a settlement agreement which the parties agreed may at the instance of the Applicant be made an order of court on an unopposed basis.

[13] When the dispute existed between the parties, the Applicant was entitled to have either launched an application or institute action against the Respondents to recover the arrear amount, but in order to avoid litigation and costs the parties elected to conclude a settlement and to reduce it to writing.

[14] If the Court has no jurisdiction to grant an order of this nature simply because of the absence of pending proceedings, it would mean that legal proceedings would first have to be instituted, should it then be resolved and a settlement agreement is

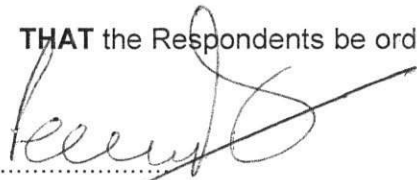
concluded, only then the Court will be empowered to make such an order. This will lead to an unnecessary duplication of legal proceedings. The term "*inherent jurisdiction*" refers to this Court's function of securing a just and respected process of arriving at a decision and it is not a factor which determines what order the Court might make after due process has been achieved (*Chunguete v Minister of Home Affairs 1990(2) SA 836 (W) at 841A; Ngoweni v Bezuidenhout 1927 CPD 130; De Wet v Western Bank Ltd 1977(2) SA 1033 (W) and Moluele v Deschatelets 1950(2) SA 670 (T)*).

[15] In my view the underlying *causa* for the order sought is the settlement agreement.

[16] This is not a matter where the Court is asked, as was contended on behalf of the Respondents, to "*rubberstamp*" the settlement agreement. It is no different than any other settlement agreement which is concluded between parties

[17] In the premises the following order is made:-

1. **THAT** the settlement agreement concluded between the Applicant and the First, Second, and Third Respondents (Annexure D to the founding affidavit) be made an order of Court.
2. **THAT** the Respondents be ordered to pay the Applicant's costs


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT

ADV W WANNENBERG

On the instructions of

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DATE OF HEARING

28 January 2013

JUDGMENT DELIVERED ON

12 February 2013