

IN THE KWAZULU-NATAL COURT, PIETERMARTIZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 1238/1991

In the matter between:

MIKE SELICK TRUST (PTY) LIMITED	Applicant
and	
CLARBEX (PTY) LIMITED	First Respondent
SHERIFF OF THE HIGH COURT	Second Respondent

J U D G M E N T

KOEN J:

INTRODUCTION:

[1] The relief persisted with by the applicant in this application, in accordance with the terms of the draft order handed up by counsel at the commencement of the hearing, is as follows:

‘1.

Any and all Writs of Execution, issued in favour of the First Respondent, by the Registrar of this Honourable Court under case No 1238/1991, be and are hereby stayed pending the outcome of an action to be instituted for the setting aside of aforementioned Writs of Execution.

2.

Such action shall be instituted within 30 days of the date of this Order.

3.

That the First Respondent be and is hereby directed to pay the costs of this application.’

BACKGROUND:

[2] The background facts related below are either common cause or not disputed.

[3] The immovable property of which the applicant is the registered owner and to which the writs relate, namely Sub 6 of the Farm SAM number 14937 ('the property'), was bonded in favour of BTR Dunlop Limited which subsequently changed its name to Dunlop Africa Limited ('Dunlop') on 2 April 1990 in terms of mortgage bond no B8625/90 as a continuing covering security for future indebtedness up to a capital amount of R500 000.00.

[4] Pursuant to an action instituted by Dunlop against the applicant, Mod Flooring Centre (Pty) Ltd. and Michael Clifton Mullen Sellick ('Sellick') under case number 1238/91, a settlement agreement was concluded on 18 October 1995 in terms of which the defendants to that action would pay Dunlop R200 000 together with interest thereon at the rate of 15,5% p.a. from 19 October 1996 to date of payment and costs of suit. The terms of that settlement were made an order of court.

[5] When that judgment was not satisfied a writ of attachment against immovable property was issued on the 9th of December 1996. This resulted in the property being sold at a sale in execution on 28 August 1997. The sale was however subsequently set aside.

[6] On or about 7 October 2008 the first respondent issued summons against the applicant under case no 12971/2008 for:

- '1. Payment of the capital amount of R157 500;
2. Payment of interest in the amount of R409 680,97 calculated up to the 28 February 2007;
3. Further interest on the amount of R567 180,97 at the prime bank rate charged by Nedbank from time to time, plus 3% calculated from 1 March 2007 until date of payment;

4. Costs of suit on the scale as between attorney and client;
5. Further and/or alternative relief.'

This claim was based on various alleged oral agreements in terms whereof the first respondent lent and advanced sums of money to the applicant during the period from 20 August 1996 to 1 July 1998, totalling R157 500. This action has apparently become dormant.

[7] *Ex facie* a deposit slip dated 1 April 1998, an amount of R70 000 was deposited by the first respondent to the trust account of Deneys Reitz Attorneys, who were at the time representing Dunlop.

[8] On 4 June 1999 Dunlop ceded, signed and transferred all its rights, title and interest into the mortgage bond registered in its favour by the applicant under mortgage bond no. B8625/90 to the first respondent for value received without recourse.

[9] On 11 December 2009 the first respondent brought an application to be substituted as the judgment creditor in case no. 1238/91. That application was opposed. The applicant attacked the *causa* of the cession on which the first respondent relied as the basis for claiming its substitution, and it also claimed that the judgment debt of R200 000 had been extinguished. The applicant and Sellick, being respectively the third and fourth respondents in that application, filed a notice in terms of Uniform rule 6(5)(d)(iii) containing the following contentions:

- (a) that the first respondent had neither alleged nor proved that the judgment, which is the purported subject of the written cession, or any portion thereof, is still extant, the first respondent bearing an onus to allege and prove (as part of its *causa* against the applicant an extant judgment debt¹ in order to pursue any claim against it.

¹ If the judgment was satisfied before the purported cession was concluded, then there would have been no right for the first respondent to have ceded to the applicant. If the judgment was satisfied after the purported session was concluded, then there is no basis for the first respondent to seek a substitution.

[10] An order substituting the first respondent as judgment creditor in the place of Dunlop was granted under case no. 1238/91 on 17 August 2010 by D Pillay J. In the course of her written reasons for that order the learned judge found that Dunlop had ceded the bond to the first respondent together with the underlying judgment debt, which cession was registered in the Deeds Office and that no attack had been launched against that registration fact. The written reasons record that the applicant and Sellick resisted the application mainly by attacking the validity of the cession. In this regard the court held that:

‘As the cession is secured by a real right which has been registered in the Deeds office, it is a fait accompli. In so far as the (applicant and Mr Sellick) wish to unravel the cession they had to bring an application citing the Registrar of Deeds as a party and to seek an order for the deregistration of the cession. For as long as the cession is intact, the (first respondent) has no choice but to apply to be substituted as plaintiff under the judgment. Hence the application was granted.’

The applicant in that matter, as in the present, alleged that the transaction with Dunlop was not a cession, but rather one in terms of which a Mr Michael William Edmunson (‘Edmunson’) interposed himself as judgment debtor in place of the applicant. On 1 January 2011 the applicant launched an application for leave to appeal against the aforesaid order in which he again attacked the *causa* of the cession and raised the issue whether the debt had been discharged or was extant. The application for leave to appeal was refused.²

[11] The applicant states that it received no writ of execution attaching the property, but that it on 27 October 2011 received a copy of the second respondent’s notice of sale in execution, for the sale of the property on 18 November 2011. It was this scheduled sale which gave rise to the present application.

² The applicant has subsequently not applied to the Supreme Court of Appeal for leave to appeal against the order of D Pillay J and the matter is accordingly to that extent *res judicata*.

THE ISSUE:

[12] The issues for determination in this application are whether:

- (a) as alleged by the applicant, Edmunson had interposed himself as judgment debtor to Dunlop, whether Edmunson (and not the first respondent) effected payment to Dunlop in the sum of R140 000 and compromised the amount of Dunlop's judgment debt of R200 000 in that sum, accordingly that at the time that the first respondent took cession of the mortgage bond and judgment debt and was substituted as judgment creditor on or about 28 August 2011 the original judgment debt had been compromised and satisfied by Edmunson, the judgment debt thereby being extinguished in the result that the first respondent can no longer seek the enforcement of the original judgment debt³ or any compromised debt, and in the alternative, whether any amount over and above the sum of R140 000.00 is not already the subject of litigation between the first respondent and applicant under case no.12971/2008; or
- (b) as contended by the first respondent, Edmunson had signed an agreement with Dunlop on 31 March 1998 in terms of which he was entitled to take cession of Dunlop's rights under the bond in exchange for payment of the sum of R140 000.00, and that any rights he had to take cession of the mortgage bond were then transferred by agreement with Dunlop to the first respondent.

THE TEST TO BE APPLIED:

[13] The applicant has elected to argue the matter on the papers. The application being one for interdictory relief pending the outcome of an action to be instituted for the setting aside of the writs of execution, the test to be applied is that enunciated in *inter alia Webster v Mitchell*⁴ where the following was said:

³ To the extent that these issues are not *res judicata* because of the order granted by D Pillay J.

⁴ 1948 (1) SA 1186 (W) at 1189.

'The proper approach is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his rights, *prima facie* established, may be only open to "some doubts". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and their rights be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.'

THE FACTS ON WHICH THIS APPLICATION IS DECIDED:

[14] The allegations advanced by the first respondent are not disputed by the applicant in its replying affidavit.

[15] According to the answering affidavit of Edmunson, an agreement, being Annexure ME5 to his affidavit was concluded between him and Dunlop, the copy annexed to the answering affidavit however being incomplete as it was signed by him but had not yet been signed by Dunlop on 31 March 1998. In terms of this agreement:

- (a) Edmunson agreed to pay a consideration of R150 500 to Dunlop, payable in instalments including one payment of R70 000 to be made on the signature date;
- (b) The consideration would be payable by Edmunson to Dunlop for Dunlop undertaking not to enforce the judgment debt against the immovable property by causing the sheriff to sell the property in execution of the judgment debt (clause 4);
- (c) Regarding the mortgage bond, within 7 days of a written request by Edmunson, and without prejudice to its rights to proceed against the applicant and/or other judgment debtors under the judgment debt of R200 000.00, interest and costs, Dunlop would cause the cession and assignment of the mortgage bond to Edmunson (clause 6.1).

[16] Consistent with what was contemplated in the agreement between Edmunson and Dunlop, the R70 000 was deposited to the credit of the trust account of Deneys Reitz by the first respondent on 1 April 1998.⁵ This fact would also be consistent with the contention expressed by Edmunson in the first respondent's answering affidavit that :

"It was subsequently agreed at a later stage with Deneys Reitz (acting for Dunlop) that the bond would be registered in favour of the first respondent as I was at all material times, as far as I was concerned, acting on behalf of the First Respondent and not personally."

[17] Edmunson's version that it was subsequently agreed with Dunlop that the bond would be ceded to the first respondent, after all it had paid the R70 000, is also consistent with the registration fact that a cession of the bond was registered in favour of the first respondent subsequently on 14 July 1999, and not in favour of Edmunson. That registration fact has been confirmed as correct in the judgment of D Pillay J, which is *res judicata*, if not of that fact alone, but then potentially also on the issue whether the debt is extant or has been extinguished by payment.

[18] The applicant cannot really deny these allegations by the first respondent. It has however sought to cast doubt on the version advanced by the first respondent with reference to the contents of various items of correspondence exchanged between Edmunson, Edmunson's daughter and Dunlop's attorneys, and draft agreements purportedly annexed to that correspondence.

[19] These references have been objected to as constituting hearsay evidence and for that reason inadmissible, and further that they were furnished to the applicant under cover of without prejudice communications from Edmunson's daughter in a *bona fide* and genuine attempt to settle the disputes, and are thus privileged. More significantly in my view, the draft agreements formed part of ongoing negotiations with terms at variance to those contained in the draft agreements, on the first respondent's version,

⁵ The R70 000 should have been paid on the date of signature. The payment one day after Edmunson had signed probably accounts for Dunlop having signed the agreement on 1 April 1998.

eventually being concluded. Even if not inadmissible, this evidence would have very little probative value. Indeed they do not disturb the inherent probabilities which are against the applicant's version. When taken with the facts set out by the first respondent, which the applicant cannot dispute, it is clear that the contentions advanced by the applicant and its claim to any *prima facie* right, is open to considerable doubt.

[20] The applicant's counsel's argument has centred mainly on Dunlop having undertaken not to enforce the judgment debt against the property by causing the sheriff to sell the property, and that the first respondent, having taken cession of the mortgage bond could not have greater rights than Dunlop itself would have in terms of the mortgage bond.

[21] Dunlop's rights to proceed in terms of the mortgage bond, as a real right registered against the title deeds of the immovable property, were not affected. All the agreement Annexure ME5 achieved was to place a personal restraint on Dunlop vis-a-vis Edmunson and enforceable by him, not to enforce the judgment debt against the property. Dunlop did not abandon or waive any specific rights it had in terms of the mortgage bond. It simply undertook not to enforce the judgment debt against the immovable property in exchange for payment of the consideration. But that would not be a restraint placed on Edmunson. Indeed in terms of the agreement, Annexure ME5, clause 6.1, Dunlop would cause the cession and assignment of the mortgage bond to Edmunson. There would be no purpose in such a cession of the mortgage bond had it become a toothless instrument where not only the mortgagee, Dunlop, but all its cessionaries and assigns would not be able to execute on the mortgage bond. As a matter of probability, the agreement could then simply have provided for cancellation of the mortgage bond upon payment of the consideration to Dunlop. In my view the first respondent is not subject to any such limitation on its rights it would enjoy in terms of the mortgage bond to execute against the property.

[22] There was some suggestion made in the founding papers that Edmunson had certain monies available to invest and that he had negotiated with Dunlop's attorneys for

the debt to be compromised and reduced to R140 000.00 with the first respondent merely providing a suretyship, in exchange for Edmunson then being entitled to use the property, and 40% of the income/turnover derived from the use of the property being utilized in reducing the applicant's indebtedness to Edmunson. This version is denied by the first respondent. He also denies that he derived any income from the use of the property. The applicant has not provided any details or documentary evidence in support of its contention that Edmunson had derived income from the use of the property, whether in the founding affidavit or in the replying affidavit. Accordingly this notion of an investment earning a return for Edmundson can be rejected safely.

[23] There is also nothing to suggest that the R140 000.00 paid for the judgment debt was included in the amounts of the individual loans forming the subject matter of the action under case no. 12971/2008.

CONCLUSION AND COSTS:

[24] The applicant has failed to prove even a *prima facie* case. There is no reason why the costs of the application should not follow the result.

ORDER:

[25] The application is dismissed with costs.

Date of hearing: 14 December 2012

Date of delivery: 16 January 2013

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