

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

In the matter between:

CASE NO. 8442/12

LOGANDRI GOVENDER

Applicant/Plaintiff

and

**BLYTHEDALE COASTAL RESORT
(PTY) LTD**

Respondent/Defendant

and in the matter between:

CASE NO. 8443/12

ANDREW STEVEN WALSH

Applicant/Plaintiff

and

**BLYTHEDALE COASTAL RESORT
(PTY) LTD**

Respondent/Defendant

JUDGMENT Delivered on 12 June 2013

STRETCH AJ:

[1] The plaintiff applicants in these two cases (Govender and Walsh) both seek summary judgment against the defendant for payment of R632 500,00 and R522 500,00 respectively.

[2] It is common cause that these claims are based on agreements

of loan and options to purchase which the defendant entered into with Govender and Walsh respectively on 18 January 2010. With the exception of the amounts of the loans and the description of the immovable properties forming the subject matter of the options to purchase, these two agreements are identical, and the parties have agreed that the facts of both cases (being identical) can be dealt with in one judgment. Accordingly all references hereinafter (although made in the singular) must be read as applying to both cases with the exception of the following:

(a) Govender undertook to lend the defendant R522 500,00 whereas Walsh undertook to lend the defendant R632 500,00;

(b) The defendant agreed to grant Govender an option to purchase fixed property at erf 714 New Guelderland, whereas he granted Walsh an option to purchase fixed property at erf 702 New Guelderland.

[3] Having identified these two differences, I shall now refer to the balance of the agreement (hereinafter referred to as “the first agreement”) and the surrounding facts in the singular, as the one set of facts is a duplication of the other.

[4] Further material terms and conditions of the first agreement are:

(a) that the parties would settle the aforesaid loan by procuring the transfer of the property into that plaintiff’s name, subject to that plaintiff exercising the aforesaid option;

(b) that should transfer of the property not be effected within 24 months from the date of the signature of the agreement, the plaintiff would be entitled to repayment of the capital sum advanced plus interest in full and final settlement of all amounts owing, on not less than 30 days' notice.

[5] Transfer of the property was not effected within 24 months from date of signature, the relevant period having expired on or about 19 January 2012.

[6] On 8 February 2012 Walsh signed an agreement of cancellation ("the second agreement") and on 16 April 2012 Govender did the same. With respect to Govender, the defendant's chief executive officer responded the next day indicating that it had received the second agreement and that the document would be signed and returned to Govender and that Govender would be kept posted on "progress of payment and reimbursement." It transpires that the second agreement was not however signed by the defendant. Needless to say, there were also no payments or reimbursements forthcoming.

[7] The plaintiff unsuccessfully demanded repayment of the loan on 2 August 2012, and accordingly instituted action on 27 September 2012.

[8] The defendant conveyed his intention to defend, whereafter the

plaintiff launched an application for summary judgment, being the application currently before me.

[9] The defendant, in opposing the application, contends that:

(a) The second agreement was prepared in error by the conveyancers' administrative staff and that it was in any event not signed by the defendant and is accordingly not binding on him (in this regard the defendant's director contradicts himself in his affidavit as he elsewhere avers that the agreement had been prepared by the plaintiff and not the conveyancers);

(b) After the second agreement had been drafted and signed by the plaintiff, the defendant entered into an agreement with the plaintiff ("the third agreement"), to the effect that:

(i) The original loan and capitalized interest would remain with the defendant and the loan would effectively be extended;

(ii) The plaintiff would continue to earn interest as before;

(iii) The loan would be repayable when another lender (and potential purchaser) had been found to replace the plaintiff;

(iv) The plaintiff would in the interim retain the option to purchase if and when the fixed property was in a position to be transferred.

[10] It is not in dispute that the plaintiff's claim is for payment of a liquidated amount in money together with interest and costs as

envisaged in rule 32(1) of the uniform rules of this court. It is accordingly incumbent on the defendant to satisfy this court, in order to successfully resist the granting of such a judgment, that he has a *bona fide* defence. It will be sufficient if the defendant swears to a defence, which is good in law, in a manner which is not inherently or seriously unconvincing. If the defendant's affidavit shows that there is a reasonable possibility that the defence which he advances may succeed at the trial, he is entitled to leave to defend.

[11] Clause 10.1 of the first agreement contains a standard non-variation clause which reads as follows:

'No alteration, cancellation, variation of, or addition hereto shall be of any force or effect unless reduced to writing and signed by both Parties to this Agreement or their duly authorised representatives.'

[12] It is contended on the defendant's behalf that the alleged third agreement is a new agreement and not a variation of the first agreement as envisaged in clause 10.1 and as such, does not need to be reduced to writing and signed by the parties. I must assume, in the light of this argument, that the defendant is accordingly relying on an oral agreement, as it would undoubtedly have incorporated the *ipissima verba* of the third agreement in the body of its affidavit, had this agreement been in writing.

[13] Counsel for the plaintiff has urged me to find that there was no third agreement; alternatively, that if there was, it ought to have been reduced to writing for at least one of two reasons:

(a) The effect thereof is to vary the first agreement and it must therefore be reduced to writing to comply with the non-variation clause;

(b) Alternatively, if it is an entirely new agreement, it must be reduced to writing in order to comply with the provisions of section 2(1) of the Alienation of Land Act 68 of 1981, because this third agreement refers to an option to purchase immovable property.

[14] Rule 32(3)(b), in referring to the defendant's affidavit or evidence resisting summary judgment, reads as follows:

'such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor' (emphasis added).

[15] From what I have managed to glean from the defendant's cursory affidavit is that the nature of its defence is that the plaintiff, after having forwarded to its director the second agreement specifically cancelling the first one (not that it was in any way compelled to cancel in writing before demanding performance in terms of the contract), and after the defendant's representative had agreed to sign the second agreement and to keep the plaintiff posted on the progress of "payment and reimbursement" (at least in Govender's case), made an about turn against its own interests and entered into an extremely vague and open-ended oral agreement with the defendant, which agreement happens to be diametrically opposed to and potentially destructive of the plaintiff's claim before me.

[16] Not only is this defence far too vague to comply with the requirements of the rule, but it is also improbable.

[17] Even if I am wrong in this regard, and even if there was a third agreement as contended for by the defendant, it is clearly a variation of the first agreement and must accordingly be reduced to writing. I say so for the following reasons:

(a) Clause 6.3 of the first agreement sets forth what is referred to *ex facie* the document as a “re-payment term”. It reads as follows:

‘Should Blythedale be unable, for whatever reason, to effect transfer of the Property to the Lender within 24 (twenty four) months of the Signature Date and provided that such delay in transfer is not due to any act or omission on the part of the Lender and provided that the Lender is not in breach of this Agreement or the Agreement of Sale, then the Lender shall be entitled to require repayment of the Capital Sum (plus interest thereon calculated at the Prime Rate from the Signature Date to date of repayment) on not less than 30 (thirty) days prior written notice to Blythedale. Should the Lender give Blythedale notice as aforesaid, the Lender shall no longer be entitled to exercise the Option.’

(b) The defendant (with reference to the 24 month period set forth as part of the re-payment terms), avers that the alleged third agreement specifically allowed for an extension of the loan which would then only become repayable when another lender (and potential purchaser) was found, and that in the interim the plaintiff would retain the option to purchase when the property could be transferred. This is in sharp contradiction to the aforesaid re-payment term at clause 6.3, which makes it clear that the same option to purchase the same property would no longer be available once the plaintiff had given notice.

[18] The law is clear in this regard. Any attempt of this nature to agree informally on a topic covered by a non-variation clause or to vary informally a contract containing a non-variation clause must fail. See:

SA Sentrale Ko-op Graanmpy Bpk v Shifren 1964 (4) SA 760 (A);

Brisley v Drotsky 2002 (4) SA 1 (SCA);

De Villiers v BOE Bank Ltd 2004 (3) SA 1 (SCA) 17-18;

***HNR Properties CC v Standard Bank of SA Ltd*
*2004 4 SA 471 (SCA) 477-480;***

***Affirmative Portfolios CC v Transnet Ltd t/a Metrorail*
*2009 1 SA 196 (SCA) [18];***

***Kovas Investments 724 (Pty) Ltd v Marais*
*2009 6 SA 560 (SCA) [22-23]***

[19] This applies particularly to an extension of time for payment as is alleged in the case before me. See:

Van Tonder v Van der Merwe 1993 2 SA 552 (W)

[20] In my view then, the alleged third agreement is clearly a variation of the first one. What it is clearly not, is a novation. A novating contract must be a valid and enforceable one if it is to have

the effect of novating the old contract. See R H Christie *The Law of Contract in South Africa 6ed (2011) at 468.*

[21] The alleged third agreement is so vague, biased and open-ended that I fail to comprehend how it could ever be effectively enforced.

[22] There is in any event a presumption against novation because it involves a waiver of existing rights. See:

Proflour (Pty) Ltd v Grindrod Trading (Pty) Ltd
t/a Atlas Trading and Shipping
[2010] 2 ALL SA 510 (KZD) [23]

[23] A creditor who has rights under an existing contract and then enters into another contract will be presumed to intend rather to strengthen and to confirm his existing rights than to waive them and accept dubious, ill-defined and vague rights (which in the alleged third agreement before me seem to rely on suspensive conditions which are in themselves vague) under the new contract in substitution. See:

Proflour *supra* at [10])

[24] In my view, the plaintiff's cause of action (as pleaded for in the summons) is for payment of a loan which has become due by virtue of a re-payment term in a written agreement which has not been lawfully

varied. Any contention by the defendant that a new verbal agreement has been entered into is not *bona fide* and has been raised solely for the purpose of delay.

[25] On the question of the costs of this application, it seems to me that the first agreement only caters for attorney and client costs in the event of the defendant instituting legal proceedings against the plaintiff, and not the other way around. I am not persuaded that there are any special grounds to justify a punitive costs order against the defendant.

In the premises I make the following orders:

ORDERS:

1. In the matter of **Govender v Blythedale Coastal Resort (Pty) Ltd** (KZP case no 8442/12) judgment is granted in the plaintiff's favour for payment of:

- (a) the sum of R522 500,00;
- (b) interest on the sum of R522 500,00 at the prime interest rate calculated from 18 January 2010 to date of payment;
- (c) the costs of this application.

2. In the matter of **Walsh v Blythedale Coastal Resort (Pty) Ltd** (KZP case no 8443/12) judgment is granted in the plaintiff's favour for payment of:

- (a) the sum of R632 500,00;
- (b) interest on the sum of R632 500,00 at the prime interest rate calculated from 18 January 2010 to date of payment;
- (c) the costs of this application.

STRETCH AJ

Appearances /...

Appearances:

For the Applicant/Plaintiff	:	Mr L. Combrinck
Instructed by	:	Tomlinson Mnguni James Pietermaritzburg
For the Respondent/Defendant	:	Mr W.J. Pietersen
Instructed by	:	Francois Medalie & Co. Pinetown C/o Messenger King Pietermaritzburg
Date of Hearing	:	30 January 2013
Date of Filing of Judgment	:	12 June 2013