FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A225/2008

In the appeal between:

LYDIA MBHELE NO Appellant

and

ETTIENE SMITH Respondent

CORAM: JORDAAN, J *et* LEKALE, AJ

JUDGMENT: LEKALE, AJ

HEARD ON: 7 SEPTEMBER 2009

DELIVERED ON: 17 SEPTEMBER 2009

INTRODUCTION AND BACKGROUND:

[1] The appellant applied unsuccessfully, in terms of section 62 of the Magistrate's Courts Act, no. 32 of 1944 ("the Act"), for the setting aside of a warrant of execution against property in the Magistrate's Court for the District of Kroonstad held at Kroonstad with the judgment being delivered on the 22 September 2008.

[2] She, thereafter, felt aggrieved by the judgment and now approaches this court, by way of an appeal against the same, on the grounds that the court *a quo*, *inter alia*, erred in its findings on the evidence insofar as:

[2.1] it did not find that the impugned warrant included interest in the amount of R39 941,77 which exceeded the capital amount of R37 517,52;

[2.2] it found that the settlement agreement concluded on the 4 July 2003, which was made an order of court, was not a novation of the default judgment issued earlier.

[3] A perusal of the court record reveals that the section 62 application was preceded by a default judgment entered against the appellant on the 11th June 2002 for payment of the capital amount of R37 517,52 plus interest calculated at the rate of 15.5% from the 1st October 1999 to date of final payment as well as costs.

[4] Consequent to the judgment the costs were, eventually, taxed after a warrant of execution had already been issued. The said warrant was re-issued on three occasions before the

impugned re-issue.

[5] During July 2003 the appellant approached the court *a quo* in terms of section 73 of the Act for the suspension of the execution of the default judgment, which move was opposed by the respondent.

[6] The parties, however, concluded an agreement on the 4th July 2003 in terms of which the section 73 application was withdrawn and the appellant undertook to pay the capital amount and costs by way of monthly installments of R800.00, among others.

[7] The said agreement was made an order of the court *a quo*. The debtor and creditor relationship between the parties continued without any apparent significant hiccups until the 24th July 2008 when the sheriff for the relevant district attached and removed property belonging to the appellant on the strength of a warrant re-issued on the 13th April 2008.

[8] As at the date of the attachment and removal, the appellant

had already paid a total amount of R57 000,00 to the respondent since about October 2002.

[9] The appellant, eventually, launched the section 62 application on the 30th July 2008. On his part the respondent filed an affidavit of his attorney in opposition of the application.

[10] The application was, eventually, dismissed with costs inclusive of costs for preparation on the 22 September 2008.

[11] The appellant, thereafter, noted an appeal which is being opposed by the respondent.

SUMMARY OF DEPOSITIONS AND SUBMISSIONS:

[12] In the Heads of Argument filed for the appellant, it is acknowledged that the argument in respect of the *in duplum* rule was not raised before the court below but a request is, effectively, being made for the issue to be heard in terms of the Notice of Appeal. In this regard it is submitted that the respondent is not, in law, entitled to recover more, in interest, than the capital amount.

[13] It is, further, argued for the appellant that the interest claimed in the warrant is wrongly calculated insofar as it is clear from the warrants that the respondent's attorney had not deducted the amounts paid by the appellant from the capital amount and, as such, calculated the interest on the wrong capital amount.

[14] The appellant, furthermore, maintains that the settlement agreement constitutes a novation and that, in terms thereof, no interest was and is payable to the respondent insofar as the agreement only provides, *inter alia*, for payment of the capital amount and costs but is silent on payment of interest.

[15] On his part, the respondent, through his attorney, contends in the opposing papers that the settlement agreement in question related only to the section 73 application and that following the same, a letter was directed to the appellant's erstwhile attorneys Du Plessis Le Roux Inc, dated the 23 January 2003 outlining the outstanding balance and including interest in the calculations.

[16] The respondent, further, contends that the said attorneys, in their response made on the 6th February 2003, did not object to the inclusion of interest in the calculations and only expressed their discontent with the interest calculated on the taxed costs from the 19 November 2002.

[17] In the aforegoing regard I must hasten to point out, at this early stage of my judgment, that the correspondence between the appellant's erstwhile attorneys and the respondent's attorneys was, in fact, exchanged before the fact of the settlement agreement and not subsequent thereto as contended for the respondent. The settlement was concluded and made a court order in July 2003 while the correspondence in question was exchanged in January and February of 2003. This issue was, therefore, in my view and to that extent irrelevant to the matter.

[18] The respondent, further, contends, by implication, that the settlement agreement in question was concluded on the 29th July 2002 viz the date on which it was, *ex facie* the same,

signed by the respondent's attorneys. It is, however, apparent that the same was received by the appellant's erstwhile attorneys on the 4th July 2003 and it was, further, made an order of the court *a quo* as having been concluded on the same date.

[19] The respondent, furthermore, concedes in his opposing papers that the liability of the appellant for payment of interest was omitted in the settlement agreement but attributes the same to a *bona fide* oversight. To the aforegoing extent he relies on the correspondence exchanged between the lawyers referred to earlier as being a very clear proof that the intention of the parties was always that the appellant would be liable for payment of interest.

[20] In conclusion, the respondent requested the court below to vary the order relating to the settlement agreement in terms of section 36 of the Act if necessary.

DISPUTE:

[21] In the Heads of Arguments submitted by and for the parties as

well as verbal submissions made by their respective counsel, the issues in dispute are limited to the following:

[21.1] whether or not the settlement agreement, *qua* an order of the court below, novated the default judgment; and if so

[21.2] whether or not the appellant's indebtedness to the respondent, in terms of the said agreement, was extinguished as at the date of the warrant of execution in question;

[21.3] in the event of the question in 21.1 above being decided in the negative, whether or not the interest levied exceeds the capital amount and, as such, offends the *in duplum* rule and is, therefore, in law not payable.

NOVATION:

[22] The issue before the court *a quo* was whether or not good cause existed, as contemplated by section 62 of the Act, for the setting aside of the warrant.

[23] In support of her contentions that there existed such good cause the appellant, effectively, relies on the settlement

agreement *qua* order of the court below as having replaced the default judgment as well as proof of payment to the respondent in the total amount of R57 000,00.

[24] On his part, the respondent contends, in the Heads of Argument filed for him as well as through his counsel in verbal submissions made before the court, that there is no merit in the argument that an order granted in terms of section 73 constitutes novation of the original judgment. In the opposing papers the respondent does not dispute payment of R57 000,00 by the appellant.

[25] In deciding whether or not such good cause existed the court *a quo*, thus, had to interpret the settlement agreement to determine its effect on the default judgment.

[26] In my view, the appellant relies on novation in the form of compromise insofar as she, in effect, contends that the settlement agreement changed the initial judgment by, *inter alia*, not making provision for payment of interest and by only referring to the capital amount and costs.

[27] As effectively and correctly submitted for the appellant, the question as to whether or not the judgment novates the contract depends on the answer to the question whether or not the judgment wholly replaces the

> **"contractual rights and liabilities of the parties *inter se*".**

(See **TRUST BANK OF AFRICA LTD v DHOOMA** 1970 (3) SA 304, at page 310).

[28] It is, further, effectively common cause between the parties that an order in terms of section 73 of the Act normally does not have the effect of novation and only gives the judgment debtor the opportunity to pay the judgment debt in affordable installments and does not entail, as a general rule, the replacement of the original court order.

[29] As was found in **TRUST BANK OF AFRICA LTD v DHOOMA**-*supra* at page 310 and in a case similar to a section 73 order,

> **"…where the only purpose of the judgment is to enable the plaintiff to enforce certain rights, by means of execution if need be, without in any way affecting other rights arising out of the contract, it seems more realistic to regard the judgment not as novating the former, but as strengthening or reinforcing them. The right of action will have been replaced by a right to execute, but the enforceable right remains the same."**

[30] Compromise is a settlement, by agreement, of disputed obligations whether contractual or otherwise. Oral agreement suffices. (See **Christie on Law of Contract in South Africa**, 5th Edition, on page 455).

[31] There must be a dispute for a compromise to take place. Without a dispute there can be no compromise. (See **KARSON v MINISTER OF PUBLIC WORKS** 1996 (1) SA 887 (E) at p 893 F – 894 I).

[32] The appellant is quick to admit that there is no express provision in the agreement to the effect that the same

replaces the original (default) judgment. She, however, effectively contends that an inference to that effect is the most plausible to draw from the facts and relies on the following excerpt from **<u>Christie in Law of Contract in South Africa</u>** (s*upra)* at p 450 in that submission:

> **"Only the very exceptional contract will expressly state that its purpose is to novate a previous one, so the intention and *consensus* that must be sought is a common intention to cancel the old contract so that it can no longer be enforced and no longer exists, and replace it with the new one."**

[33] The question in this matter is, in my view, whether or not the enforceable right in terms of the original judgment remained the same after the settlement agreement was concluded and made a court order. (See generally **<u>TRUST BANK OF AFRICA LTD v DHOOMA</u>** *(supra).*

[34] Although the court below seems to have, inadvertently, been under the impression that the settlement agreement is a section 73 order, I am of the view that that was not the case. The aforegoing flows from the fact that:

[34.1] the appellant specifically withdrew the section 73 application in terms of the said agreement;

[34.2] no order in terms of section 73 could, thus, ensue in the absence of such an application.

[35] It follows from the above finding that the making of the settlement agreement an order of court was not in terms of section 73. The aforegoing prevails despite the finding by the court *a quo* that:

> **"Die skikking is duidelik ten opsigte van die artikel 73 aansoek – dit is ook die aansoek wat voor die hof gedien het."**

(See line 1, page 40 of the record).

[36] However the contract may be described by the parties, the court looks at the substance rather than the form in order to decide whether a particular obligation or dispute has been compromised. (See **NATIONAL EMPLOYERS GENERAL INSURANCE COMPANY LTD v SPRINGBOK TIMBER AND HARDWARE COMPANY** 1969 (3) SA 444 (W) at p 447).

[37] The fact that the settlement agreement, in its dominant clause, declares that it is **"ter skikking van die artikel 73**" does not, in my view, necessarily mean that,

[37.1] the agreement is limited, in its effect, to section 73;

[37.2] the ensuing judgment making the agreement a court order was made in terms of section 73.

[38] The court below had to construe the agreement as a whole to establish if it has the effect of rendering the enforceable right conferred on the respondent by the default judgment not the same.

[39] There was, in the court's view, a dispute between the parties, as at the date of the agreement, with regard to whether or not the execution of the judgment should be suspended and, as such, there existed a jurisdictional fact necessary for compromise to take place.

[40] The agreement in question deals with the subject matter of the default judgment and specifically mentions capital amount and

costs. It provides for the manner of liquidating the capital amount and costs, which can only be those to which the respondent is entitled in terms of the default judgment or the warrant of execution already issued as at the date of the agreement. To the aforegoing extent, the agreement is similar to an order envisaged by section 73.

[41] The agreement, further, makes provision for, *inter alia*, payment of additional costs and collection commission but is conspicuously and curiously silent on the appellant's liability for further interest and how the same is to be paid.

[42] The right which the respondent acquired through the default judgment is, most probably, payment of the capital amount, interest and costs. As at the date of the agreement a warrant of execution had already been issued and re-issued with the judgment debt reflected, in the warrant, including interest accrued and payable as at the date of the warrant.

[43] In the determination of the issue of novation the court, in my view, is not concerned with the intention of the parties but with

the effect of the new agreement or judgment on the earlier agreement or judgment. The question as to whether or not the parties intended such an effect arises in an appropriate case such as rectification of the agreement or variation and/or rescission of the judgment.

[44] Contentions on behalf of the respondent to the effect that the omission of payment in respect of interest in the agreement was as a result of a *bona fide* oversight are, therefore, beyond the issue. The fact of the matter is that the judgment which made the agreement an order of court had not been rescinded or varied as at the date of the section 62 application.

[45] There was no application for rectification before the court *a quo* and the issue which fell to be decided concerned novation.

[46] Mr Coetzer, for the appellant, persisted in the contention that reference in the agreement to capital amount was, in fact, reference to the capital amount as per the default judgment and it excluded interest as set out in the earlier judgment. In

the appellant's view no interest whatsoever was payable as a result of the agreement.

[47] The aforegoing was, in the appellant's case, the nature and extent of the novation relied on before the court below.

[48] The enforceable right which the respondent had in terms of the earlier judgment is, however, affected by the agreement insofar as no provision is made in the agreement for payment of further interest in accordance with the default judgment.

[49] To the aforegoing extent, the settlement agreement *qua* a court order novated the original judgment in that the enforceable right to **"interest until final payment of the capital amount"** did not remain the same after the agreement.

[50] The appellant's contention with regard to the nature and extent of novation, in the court's view, loses sight of the following and, as such, does not carry water:

[50.1] it is to the effect that interest was not payable *ab initio*;

[50.2] the appellant's contention that she had already paid R57 000,00 as at the date of the impugned warrant together with copies of receipts attached to her affidavit covers payment of R20 000,00 made to her erstwhile attorney and which is also not disputed by the respondent in his opposing papers;

[50.3] the said payment was apparently and most probably made before the date of the agreement insofar as it was made to her attorneys on the 16th October 2002 according to page 9 of the record. This amount can, reasonably, be expected to have found its way to the respondent's attorneys long before the 4 July 2003;

[50.4] as at the 4 July 2003, when the agreement was made, interest payable was, most probably, in excess of R15 677,18 which was due and payable as at the date of default judgment according to the first warrant issued. (See p 27 of the record);

[50.5] that payment of R20 000,00 would have been applied first towards satisfying the costs and interest before it could extend to the capital amount;

[50.6] it is, thus, clear that, as at the date of the agreement, the payment in question would have already been applied;

[50.7] for the alleged novation to operate retrospectively to the date of the default judgment, so as to sustain the appellant's contention, it would have been necessary for either a specific provision to that effect to be made in the agreement or a provision to the effect that all payments made to the date of the agreement would be regarded as having been in respect of the capital amount and costs and not in respect of interest to be made. There is no such provision *ex facie* the agreement;

[50.8] the tenor of the agreement, further, indicates that it applies going forward insofar as the first payment is, *inter alia*, to be made not later than the 7th August 2003.

[51] In the court's view the capital amount referred to in the

agreement, most probably, bears a liberal, as opposed to a restrictive meaning attached to it by the appellant, and refers to the amount of R53 267.66 appearing as the first amount of the warrant on p 24 of the record, viz the re-issue of the warrant dated the 24 February 2003.

[52] In my view, after the date of the agreement the appellant was not liable for payment of further interest going forward. In other words the respondent was not entitled to levy any interest on the amount outstanding on the debt. In this regard, it should be noted that, while an order for payment of the capital amount is independent of and can be issued as a stand alone order without any accompanying order for payment of interest, the contrary is true about an order for payment of interest insofar the latter is dependent on and is, *inter alia*, intended as a cushion, to the former, against erosive effect of inflation.

INDEBTEDNESS:

[53] In the court's view the judgment debt, inclusive of costs, as at the date of the agreement was less than the R67 910.35

reflected on the re-issued warrant dated the 24th February 2003, viz p 24 of the record insofar as payments made by the appellant as at that date are not reflected and are given as nihil. The aforegoing state of affairs is not correct because, according to the undisputed deposition of the appellant, she at least effected payment of R20 000,00 during 2002. This amount should have been reflected in that re-issued warrant.

[54] The said payment, as alluded earlier, was most probably laid out to extinguish the costs and part of accrued interest as at the date of payment leaving the capital amount, as per the default judgment, intact. It follows, therefore, from a simple exercise in commercial mathematics that the appellant's calculations in paragraph 6 of her affidavit, viz p 4 of the record, are not correct insofar as they make no provision for the said accrued interest which, as at the date of the original judgment, amounted to R15 677,18.

[55] On the appellant's version and taking into account the said accrued interest, she was, at least, indebted to the respondent in the amount of R15 585,98 as at the date of the warrant in

question as follows:

Total amount of debt as per appellant	R 56 908.80
Add accrued interest as at 11-6-02	+R 15 677.18
	R 72 585.98
Less total paid as per appellant	-R 57 000.00
	R 15 585.98
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[56] The aforegoing amount excludes further costs and/or interest and is based solely on the appellant's version as reflected in paragraph 6 of her affidavit, viz p 4 of the record.

[57] The court is not called upon, in this matter, to make a precise commercial calculation of the extent of the appellant's indebtedness or otherwise to the respondent. The court's task is simply to establish if there exists good cause for the setting aside of the warrant in question on the basis that the appellant is no longer indebted to the respondent. In other words, whether or not the *causa* for the warrant has fallen away. (See **RAS EN ANDERE v SAND RIVER CITRUS ESTATES (PTY) LTD** 1972 (4) SA 504 (T) at 510E).

[58] The law is that a judgment debtor is not entitled to have the warrant issued against him set aside on the basis that it reflects an inflated or too large an amount than he actually owes without proof of actual prejudice suffered by him as a result of the issue of the warrant in such an exorbitant amount. (See **DUNLOP RUBBER CO v STANDER** 1924 CPD 4 59).

[59] In *casu* it is probable that the warrant reflects an amount which is more than what is due by the appellant. The question is, therefore, whether or not there is substantial prejudice to the appellant to warrant the setting aside of the writ in question.

[60] Mr Coetzer could not show any substantial prejudice, on the part of the appellant, as same is not apparent from the material properly before the court.

[61] An averment in appellant's affidavit to the effect that the furniture attached is her exclusive property and that she needs the same is, in my view, a self-evident prejudice which is not

contemplated by the law as constituting substantial prejudice for the purpose of setting aside the warrant. (See **<u>DUNLOP RUBBER CO v STANDER</u>** *(supra)* where the court found that the fact that the judgment debtor had to pay the full amount of the writ, although he owed less, in order to escape arrest, did not constitute substantial or the element of prejudice required.)

[62] In circumstances where the writ includes an amount which is not due and payable, the law is that the proper course of action is to have the warrant amended to the extent of reducing or adjusting the sum reflected to the correct one. (See **<u>DUNLOP RUBBER CO v STANDER</u>** *(supra).*)

[63] In the present matter there was no application for the amendment of the warrant before the magistrate, as the appellant's case was that she was not indebted to the respondent in any amount whatsoever. Had she tendered payment of the amount which was legally owing to the respondent the position could, most probably, have been different.

[64] In this court there is no such an application for amendment and the court, further, does not have sufficient material before it to engage in the mathematical exercise of identifying the correct amount owing.

[65] It is, further, probable that the appellant became liable for further interest once she failed to effect payment of a single agreed installment after the 4th July 2003. In this regard, it should be noted that the agreement, *qua* court order, provides that the whole outstanding amount becomes due and payable in such an event. It is apparent from copies of the receipts attached to the appellant's affidavit that the last payment was made in 2007 and, therefore, as at the date of the impugned warrant the appellant had skipped payments. In such circumstances interest at the prescribed rate becomes payable *ex lege* in terms of section 2 of the Prescribed Rate of Interest Act no. 55 of 1975.

[66] Mr Coetzer implored the court to remit the matter, where necessary, to the court below with directives for the warrant to

be amended. On the other hand Mr Gilliland, on behalf of the respondent, argued vehemently for the dismissal of the appeal with costs.

[67] The course of action proposed by Mr Coetzer is, in the opinion of the court, not appropriate because it is not the appellant's case that the warrant is inflated and needs to be corrected. The extent of the inflation is, further, not known to the court.

[68] Consequently the court cannot give directions to the court *a quo* when it is, itself, not in a position to formulate the same with any measure of clarity.

[69] In the premises the court only deals with what is properly before it by way of appeal.

ORDER

[70] In the result the appeal is dismissed with costs.

[71] The decision of the court below is, therefore, confirmed and, as such, prevails.

L. J. LEKALE, AJ

I concur.

A. F. JORDAAN, J

On behalf of the applicant:	Adv. J. C. Coetzer Instructed by: Rosendorff, Reitz Barry BLOEMFONTEIN
On behalf of the respondent:	Adv. J. G. Gilliland Instructed by: Naudes BLOEMFONTEIN

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