

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

CASE NUMBER: 14063/2018P

In the matter between:

FIRSTRAND BANK LIMITED

APPLICANT

And

SHIVAL RAMPERSAD

FIRST RESPONDENT

MSUNDUZI MUNICIPALITY

SECOND RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Applicant has brought an application that paragraph 3 of the order granted by this court on 27 July 2020 be amended and be replaced with a new paragraph 3. This application is opposed by First Respondent. At the hearing of the said application Applicant handed in an amended draft order which is far more comprehensive and contains more extensive relief than that which is set out in the notice of motion.

[2] Default judgment was granted by the Registrar of this court on 1 July 2019 against First Respondent for payment of R 913 506.68 and interest thereon at the rate of 16,1% per annum and costs on an attorney and client scale. It further set out that the credit agreement concluded between Plaintiff and Defendant was declared cancelled. The application to have the property declared executable was adjourned *sine die*.

[3] On 30 September 2019 an application was brought by Applicant to be heard on 14 November 2019 to have the said property declared executable. This was based on the judgment which was granted by the Registrar for the monetary relief. First Respondent filed a notice to defend on 1 November 2019. An opposing affidavit as well as a replying affidavit was filed. On 14 November 2019 the matter was adjourned to 4 December 2019 and First Respondent to pay the wasted costs. On 4 December 2019 it was adjourned *sine die* with First Respondent to pay the wasted costs.

[4] The matter was then set down on 21 April 2020 on the opposed roll. Due to the covid lock down applicable at that time the matter was reinstated on the roll for 28 July 2020. However the stamp of the order which was granted is dated 27 July 2020. That does not take the matter any further as it is common cause that that was the order which was granted by consent between the parties. A draft order was handed to the court which was then granted by Chili J.

[5] In terms of the said order the immovable property described as Erf 1[...] L[...], Registration Division FT, Province of KwaZulu-Natal, In extent 764 square metres was declared executable and a reserve price of R600 000.00 was set by the court. Paragraph 3 of the order reads as follows:

“It is directed that Applicant shall not proceed with the sale in execution of the immovable property unless First Respondent fails to pay the amounts of R11 500.00 per month on the 7th day of each month until the arrears are settled in full and thereafter his current monthly instalment.”

Now some three years later on 31 March 2023 Applicant brings an application which was heard on 5 September 2024 that paragraph 3 of the order which I have set out above be replaced with the following paragraph 3:

“3. It is directed that Applicant shall not proceed with the sale in execution of the immovable property unless First Respondent fails to pay an amount each month equivalent to the monthly instalment as varied from time to time (dependent on varying interest rates applicable to the loan) and in

addition a further amount of R13 956.71 per month to reduce the arrears, such amounts to be paid on or before the 7th day of each month until the arrears are settled in full and thereafter the current monthly instalment paid each month.”

[6] As set about above at the hearing a new draft order consisting of two pages which is totally different to the relief set out in the notice of motion was handed to court. It is lengthy and I am not going to incorporate it herein. In terms thereof paragraph 3 of the order of 1 July 2019 is set aside and the credit agreement concluded between Applicant and First Respondent dated 6 January 2018 be reinstated and remain applicable and enforceable between Applicant and First Respondent. In paragraphs 2 and 3 it deals with the variable interest rates, how the payments have to be made in terms thereof and in paragraph 3.1 that an amount of R18 000.00 per month to be paid until the arrears are settled in full and that it will be reviewed every twelve months to ensure that the loan is repaid within the period as stipulated in the loan agreement and First Respondent to pay Applicants costs of the application on the scale as between attorney and client.

[7] It is common cause between the parties that First Respondent has complied with the provisions of the order dated 27 July 2020. This is further borne out by the fact that Applicant has at no stage to date sought any order to have the property sold in execution.

[8] In paragraph 1 of the draft order handed up at the hearing Applicant seeks an order that the credit agreement concluded between Applicant and First Respondent dated 6 January 2018 is reinstated and the terms thereof are to remain applicable and enforceable between Applicant and First Respondent. Applicant in its founding affidavit made out no case for this relief and that the agreement be reinstated. There was in actual fact no mention thereof at all. It is only in the replying affidavit after it was raised by First Respondent that the agreement was cancelled by the order granted by the

Registrar that Applicant stated in its replying affidavit that it is therefore necessary that the original agreement be reinstated.

[9] In *Sewpersath v Dookie* 2009 (6) SA 611 (SCA) it concerned the sale of property. The agreement had been validly cancelled. The question was whether by conduct the agreement had been reinstated. It was held at 616 D:

“An agreement to revive requires a fresh meeting and concurrence of the minds of the parties to restore the status quo ante. No basis for a finding that there was consensus between the parties that the agreement be revived is to be found in the affidavits filed by the parties.”

This in my view is exactly what appears from the papers. The order of the Registrar cancelled the said agreement. Applicant now only in its reply and in its draft order seeks for it to be reinstated. That in itself supports the contention of First Respondent that the agreement had been cancelled, otherwise there would be no necessity to revive it. It was submitted that it was revived by the conduct of the parties and the terms of the order dated 27 July 2020 where it refers to the current instalment and therefore that indicates that it was still to be done in terms of the agreement.

[10] As already stated, in my view, Applicant did not make out a case for the reinstatement of the agreement in its founding papers nor even in its replying affidavit. It should have been done in its founding affidavit. There is nothing to indicate that there has been a fresh meeting of the minds, nor any consensus between the parties to revive the court order. The agreement between the parties was therefore cancelled and what remained was the debt owing to Applicant by First Respondent as appears from the order of the Registrar. First Respondent and Applicant then reached an agreement as to how this amount was to be repaid which resulted in the draft order which was handed in by consent and which is now the basis of the relief claimed.

[11] It was submitted on behalf of Applicant that since the order was granted in July 2020 the payment of R11 500.00 per month was insufficient as it does not even cover the interest as that has continuously risen since that date. It was submitted that

therefore it was necessary that a variation of the order be granted. It was submitted that the purpose of Rule 42 is to correct expeditiously an obviously wrong judgment or order. The court must be influenced by fairness and justice of the particulars of each specific case. It was submitted that the shortfall when payment is made by First Respondent constitutes an unforeseen result which follows from the order. Therefore the order needs to be varied. It is submitted that a payment of at least R18 000.00 per months until the areas are settled in full would be required. I was referred to the decision of Felix Vulakhani Buthelezi and Others v Ephraim Nkunene Zungu and Others 2020 (ZAKZPHC72) (26 November 2020) a judgment of Gorven J, as he then was, which dealt with the amendment or variation of an interlocutor order. It held at paragraph 11:

“The starting point must be that the variation is not there simply for the asking. . . It is trite that court orders should not be varied unless there is some compelling reason to do so.”

It was held in paragraph 17:

“That the parties agreed that the order should be varied so as to clarify matters.”

It was held in paragraph 20:

“It was submitted that the order had unintended consequences not brought to the attention of the judge dealing with the matter.”

In the present matter the question arises whether there were any unintended matters which were not brought to the Court’s attention and whether the parties agreed to the variation.

[12] Mr Chetty, appearing on behalf of First Respondent, referred to Rule 42 and submitted that the requirements of Rule 42 have not been met and that it cannot be brought under any of the subparagraphs of Rule 42 as the judgment was not erroneously sought or erroneously granted. Secondly there is no ambiguity or patent error or omission and thirdly that it was not due to mistake common to both parties. It was further submitted that there were no new facts and that the judgment in the Buthelezi matter did not apply. It was not an interlocutory application and the application to vary was brought three years after the order had already been made, it was thus not done expeditiously. It was based on a default judgment which was

granted where the interest rate was fixed at that stage in the order. There could be no common mistake, no patent error and there was nothing exceptional and that the agreement had been cancelled. There was accordingly no existing agreement still in place between the parties.

[13] It was submitted by Mr Pietersen in reply that there are new facts arising out of the interest rate which was not fixed and variable and the agreement having to be reinstated. The application could be brought in terms of Rule 42. As far as the delay is concerned he referred to paragraph 24 of the papers where it sets out that there were various discussions with First Respondent in respect of the payments which had to be made.

[14] A consideration of these letters and correspondence indicates that it only emanates from February 2023 some three years after the orders had already been granted.

[15] Mr. Chetty referred to the decision of *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304 E where it was held:

“Thus as in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. Indeed it was common cause that in such a case no even a court that gave the judgment or order can be asked to state what is subjective intention was in giving it.”

[16] As set out above there has been no consensus between the parties that the order was incorrect, that it was erroneous and that it had to be varied. There is also no new facts which have come to the attention of Applicant which was not available to Applicant at the time that it took the order by consent. The monetary judgment had been granted with a fixed interest rate which Applicant must have been aware of and

which it was satisfied with for a period of over three years. Only then did it decide that due to the fluctuating interest rate it wanted an increased monthly amount.

[17] As I have already set out above the agreement was cancelled. There is no case made out for the revival of the agreement in the papers. I thus remains cancelled and First Respondent is to pay the amount set out in the order granted by Chili J. to avoid execution of the property.

[18] The order is clear that a monthly payment of R11 500.00 per month is to be made until the interest is paid and thereafter the "current amount". However as that must refer to the agreement which is cancelled it cannot apply. It would have been very easy for the parties to insert in the draft order at that stage what was meant by the current instalment. The word current, if one considers the explanation thereof in the dictionary means 'at present' and in the context would appear to be the instalment which it was at the time that the order was taken. From the papers it appears that the arrears at the time that the order was taken was in the sum of approximately R97 444.00 and in the later affidavit it appears that the amount has indeed increased. However as I have stated that has to be in respect of the amount owing and that that has to be repaid.

[19] First Respondent has indicated that he is prepared and in a financial position to increase the instalments of R11 500.00 by R3 000.00 per month to assist with the repayment. It would appear to me in the circumstances that it would be just and equitable that the monthly instalment therefore be increased by the sum of R3 000.00 per month.

[20] The draft order in my view is for the reasons set out above not appropriate in the circumstances and further that no case has been made out in the papers for such an order to be granted.

[21] Applicant is seeking costs of this application from First Respondent on a scale as between attorney and client. However this application has not been brought about by the conduct of First Respondent. It is common cause that First Respondent has made all payments that he had to make as was agreed upon between the parties. In the circumstances, in my view, First Respondent was not responsible for this application and that Applicant should therefore pay First Respondents costs in the circumstances. Accordingly the following order is made.

1. Paragraph 3 of the order by Chili J, dated 27 July 2020, is varied by substituting the amount of R11 500.00 with the amount of R14 500.00 per month.
2. Applicant is to pay First Respondents costs of opposing this application.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED ON:

5 SEPTEMBER 2024

JUDGMENT HANDED DOWN ON:

18 SEPTEMBER 2024

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