IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO CA 2/2014
DATE HEARD: 05/12/2014
DATE DELIVERED: 05/02/2015

In the matter between

RAYMOND MPUMELELO TWAKU **APPELLANT**

and

MEMBER OF EXECUTIVE COUNCIL RESPONSIBLE FOR EDUCATION, EASTERN CAPE PROVINCE **1ST RESPONDENT**

THE SUPERINTENDENT-GENERAL OF THE DEPARTMENT OF EDUCATION **2ND RESPONDENT**

JUDGMENT

ROBERSON J-:

[1] The appellant, an educator employed by the second respondent, instituted action against the respondents for payment of damages for breach of contract. The court *a quo* dismissed the appellant's claim with costs, including certain reserved costs. This appeal lies against that decision.

[2] The appellant's claim arose from the following circumstances which were not in dispute. In terms of his contract of employment, the appellant was entitled to receive certain benefits from the Department of Education (the Department), one of which was a housing subsidy. During 1991 the appellant acquired an immovable property with a dwelling thereon (the property). A mortgage bond in favour of Ciskei Building Society in securement of a loan was registered over the property and the appellant was obliged to repay the loan in monthly instalments. Following various transfers of assets and liabilities between banks, the appellant was eventually obliged to repay the loan in monthly instalments to Nedbank (the bank).

[3] In terms of its policy relating to the housing subsidy for employees, the Department paid the appellant a monthly housing subsidy, deducted the monthly instalments due in terms of the loan from the appellant's salary, and paid the amounts directly into the appellant's home loan account at the bank. These payments would have been reflected on the appellant's monthly salary advice. Following the non-receipt of payment of certain instalments, on 26 November 2003 the bank (at the time People's Bank) obtained judgment in the magistrate's court against the plaintiff for the full amount outstanding in terms of the mortgage loan agreement and for an order declaring the property specially executable. The appellant was subsequently served with a notice of a sale in execution of the property.

[4] Following an undertaking by the Department to pay R25 431.00 to the bank by no later than 5 March 2004, the sale in execution was cancelled. The Department

paid this amount to the bank but it was not credited to the appellant's home loan account and was held in the bank's suspense account and subsequently refunded to the Department. During April 2004 a Mr. Ratsibe of the Department notified Nedbank that he would follow up on the refunded payment and would pay the monies directly into the appellant's home loan account. No payment was made and the sale in execution was again advertised, the date of the sale being 21 June 2005. On 8 June 2005 the Department paid the sum of R12 267.00 into the appellant's home loan account. As a result of the failure to pay the full amount in terms of the undertaking, on 21 June 2005 the bank purchased the property for R10.00 at the sale in execution and the appellant was subsequently evicted from the property.

[5] On 11 August 2005 an agreement was reached between the bank and Mr. Ratsibe to the effect that if R10 675.00 was paid the sale would be cancelled. By letter dated 12 August 2005 Mr. Ratsibe informed the bank that payment would be made into the appellant's account within 14 days. The Department was given an opportunity until 31 October 2005 to make such payment. The appellant alleged that this sum was not paid and as a result the property was transferred to the purchaser. The respondents maintained that authority was given to pay the sum of R12 038.00 into the appellant's home loan account on 14 September 2005 but this sum was returned to the Department. According to a statement of the Department's bank, First National Bank (FNB), the sum was unpaid because there was "no such account". The sum of R12 038.00 was eventually paid into the appellant's personal bank account on 29 March 2006.

[6] The alleged failure to pay the full arrear sum of R25 431.00 into the appellant's home loan account at Nedbank, and the alleged failure to pay the further R10 675.00, were essentially the breaches on which the appellant relied which resulted in the sale in execution and the eventual transfer of the property to the purchaser. I should add that the appellant's particulars of claim did not very clearly express a claim in contract and suggested rather a claim in delict. For example it was alleged that the Department owed the appellant a duty of care to ensure that the arrears on the bond were paid in accordance with the undertaking and that the Department wrongfully, unlawfully and negligently, alternatively recklessly, failed to pay the arrears and failed to prevent the sale in execution from proceeding. However there were sufficient allegations concerning the Department's contractual obligation to pay the monthly instalments into the appellant's home loan account and its failure to perform that obligation in the instances mentioned.

[7] The damages claimed were pleaded as (i) the difference between the total amount deducted from the appellant's salary from 1991 to 2005 and paid by the Department to the bank, and the reasonable rental the appellant would have paid in Alice where he resided; and (ii) the difference between the value of the property, and the amount owed by the appellant in terms of the loan agreement.

[8] At the trial the issue of liability was separated from the issue of quantum and the issue for decision was whether or not the sum of R12 038.00 had been paid into the appellant's home loan account at the bank. The evidence relied upon by the appellant was an affidavit by one Justine Xavier Greyling, an employee of Nedbank.

The minute of a Rule 37 conference held between the parties' attorneys on 22 April 2013 recorded the following:

> "1. It was agreed that there was no need for the Plaintiff to call the witness Justine Xavier Greyling to testify in confirmation of the contents of her affidavit attest (sic) to in Johannesburg on the 11 November 2010.
>
> 2. The Defendant (sic) agrees that the affidavit, a copy of which is annexed hereto, may be handed to the court without the necessity of calling the said witness.
>
> 3. The contents of the affidavit are not disputed by the Defendant (sic)".

[9] In the affidavit Greyling stated the following:

> "1. I am an adult female employed as the Recoveries Officer for Home Loans, Legal in the Collections and Recoveries, Specialised Services Department of Nedbank.
>
> 2. I am authorised to depose to this affidavit and the contents hereof are within my own personal knowledge and/or are apparent from the files which are under my direct control.
>
> 3. On 5 September 2010 Messrs Smith Tabata attorneys forwarded a letter by facsimile transmission to my colleague Mr Henk Ackerman. A copy of that letter, as well as the attached transaction report are annexed hereto marked annexure "A1- A5".
>
> 4. I have investigated the queries raised therein and state the following:
>
> 4.1 There is no record of the sum of R12 038.00 being deposited into the bond account, nor can any payment for that amount be traced as a deposit into Nedbank's suspense account on or about 14 September 2005.
>
> 4.2 The bond account of the Plaintiff was still open at that stage, and is still currently open;
>
> 4.3 The reference to the account number on the transaction report attached to the aforesaid letter is indeed correct;
>
> 4.4 Accordingly if any funds were deposited into the Plaintiff's bond account they would have been accepted.
>
> 5. I can furthermore find no record that any funds were paid over and/or sent back to First National Bank on or about 16 September 2005 from Nedbank.
>
> 6. All the staff who would have had personal knowledge of this account at that time had long since left the employ of Nedbank. This would include knowledge of the bond account, the suspense account and the approval of any refunds at that time".

[10] The letter Greyling referred to in paragraph 3 of her affidavit was a letter from the appellant's attorneys asking if Nedbank had records of R12 038.00 being paid into the appellant's home loan account or Nedbank's suspense account, and of R12 038.00 being paid by Nedbank to FNB on 16 September 2005. The transaction report referred to in paragraph 3 of the affidavit which was attached to the letter, was a disbursement report generated by the Department. It reflected that on 14 September 2005 payment of R12 038.00 to the appellant's home loan account was authorised.

[11] Two witnesses were called by the respondents. The first was Mr. Chuma Nombembe, who has been employed by the Department since 2009 and at the time of testifying was a controller in a system known as the Basic Accounting System (the BAS). He explained that details of persons who are to be paid by the Department and the amounts to be paid are loaded into the BAS. On the date the persons are to be paid, the Department notifies the Treasury Department accordingly and the Treasury Department makes the payments into the various bank accounts. If there is a problem with payments, the Department's bank, FNB, will indicate on its statement which payments have been returned.

[12] Nombembe was referred to the same disbursement report as that mentioned by Greyling, which reflected, *inter alia*, that on 14 September 2005 under disbursement number 0071474 one Bertus authorised payment of R12 038.00 into the appellant's home loan account at Nedbank. The details of the payment to be made would have been furnished to a section in the Department known as the MDT section by Mr. Ratsibe, who had given the undertaking on behalf of the Department

to pay the arrears of R25 431.00. The MDT section would in turn have given the details of the payment to the payment section. The monies used to make this payment would be those which had been held in Nedbank's suspense account and subsequently refunded to the Department. Unlike other disbursements in the document whose status was reflected as "paid", the status of the payment to the appellant's home loan account was reflected as "auth" (authorised) because there had been a problem with payment to the beneficiary.

[13] Nombembe testified further that according to FNB's statement on 16 September 2005 this amount was credited to the Department with the narrative "no such account", and the reference was "Basbed Ec:Dept 0000071474". As a result the same Bertus cancelled the payment authorisation. The money would have remained in the Department's account until there was a query by the appellant concerning non-payment into his home loan account.

[14] Nombembe agreed that a reconciliation of account statement of the appellant's home loan account for the period 1 January 2002 to 14 October 2005 did not reflect any payment received on 14 September 2005. This statement formed part of the respondents' trial bundle and had been requested from Nedbank by the Department.

[15] The respondents' second witness was Mr. Vitsha Swana, who is employed by FNB in its public sector banking division. His analysis of the entry in the FNB statement that there was "no such account" was that the money did not reach the intended account and was returned to FNB. He had no personal knowledge of the

transaction or why the payment was returned. The information that there was no such account would have come from the bank which was supposed to receive the money in accordance with the instruction from the Department. Swana was not able to tell from the statement for which bank the payment was intended. The statement did not reflect the bank or the account number to which payment was intended to be made. He agreed that the reference number on the bank statement, 000071474 was the same as the disbursement number on the disbursement report referred to by Nombembe, and that the bank account into which payment of R12 038.00 had been authorised was, according to the disbursement report, held at Nedbank. He concluded therefore that the bank which rejected the payment of R12 038.00 was Nedbank.

[16] It is apparent from the judgment of the court *a quo* that the respondents' counsel objected to the admissibility of Greyling's affidavit. The learned judge agreed with the submission of the appellant's counsel that the agreement reached at the Rule 37 conference was a binding agreement that the affidavit would be used as evidence at the trial. It is further apparent from the judgment that the respondents' counsel then submitted that the affidavit constituted inadmissible hearsay evidence, because of the statement in the affidavit that the staff who would have had personal knowledge of the appellant's bond account were no longer in the employ of Nedbank. The learned judge upheld the respondents' contention that the affidavit constituted hearsay evidence because it depended upon the personal knowledge of staff members who had left the employ of Nedbank. He referred to the following definition of hearsay evidence contained in s 3 (4) of the Law of Evidence Amendment Act 45 of 1988:

> "Hearsay evidence means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence."

He concluded that the probative value of the statements made by Greyling did not depend on her credibility but on the credibility of the former staff members of Nedbank who did not testify. He accordingly found Greyling's evidence to be inadmissible.

[17] The learned judge further was of the view that the evidence of the respondents' witnesses was credible and that it could not be disputed that the appellant's correct details had been loaded into the BAS correctly, that the treasury instructions were received by FNB, that FNB paid Nedbank using the correct home loan account number, that the payment was unsuccessful, and that the reasons therefor were furnished by Nedbank, namely that there was no such account.

[18] The learned judge dealt with the claim as one in delict and concluded that there was no evidence to suggest that the respondents foresaw that Nedbank would not receive the payment of R12 038.00. Nedbank's rejection of the payment was an *ex post facto* event about which the respondents could do little or nothing and they would therefore not have been able to take steps to guard against the damages suffered by the appellant. The appellant's claim was accordingly dismissed.

[19] I am respectfully of the view that the learned judge erred in his rejection of Greyling's evidence as contained in her affidavit. In *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another* 2010 (4) SA 122 (SCA) at para [6] Cachalia JA said the following (footnotes omitted):

> "[Rule 37] was introduced to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise. Admissions of fact made at a rule 37 conference, constitute proof of those facts. The minutes of a pre-trial conference may be signed either by a party or his or her representative. Rule 37 is thus of critical importance in the litigation process. This is why this court has held that in the absence of any special circumstances a party is not entitled to resile from an agreement deliberately reached at a rule 37 conference."

[20] The agreement reached at the Rule 37 conference was recorded in clear and unambiguous terms. It was agreed that the contents of the affidavit were not in dispute. The reference to former staff was irrelevant. Greyling had the files under her direct control. The effect of the agreement was that the respondent admitted that there was no record at Nedbank that on 14 September 2005 the amount of R12 038.00 was deposited into the appellant's home loan account or held in the bank's suspense account, and further admitted that there was no record that funds were returned to FNB on 16 September 2005. The agreement left no room for an attack on the content of the affidavit on the basis that it constituted hearsay evidence. Such an attack bordered on an attempt to resile from the agreement. The evidence of Greyling should therefore have been accepted.

[21] Given the admissions made by the respondents, evidence led by them to the contrary was inadmissible. In any event, such evidence was of negligible probative value. Swana had no personal knowledge of the transaction reflected on the FNB statement whereby R12 038.00 was returned to the Department. The statement did not reflect that it was Nedbank which informed FNB that there was no such account. Swana's conclusion that it was Nedbank was based on the Department's disbursement report which was shown to him while he was testifying. As an employee of FNB he had no personal knowledge of how that report was compiled.

His evidence simply did not displace that of Greyling's (which was admitted) when she stated that there was no record that funds were returned to FNB by Nedbank on 16 September 2005.

[22] The appellant therefore proved that the Department breached its obligation to make payments into his home loan account. This breach caused the sale in execution of his property, its eventual transfer to the purchaser, and the appellant's loss of his property. The appellant was entitled to claim damages which would place him in the position he would have occupied had the contract been properly performed, such damages limited to those which flowed naturally and generally from the kind of breach in question and which the parties contemplated as a probable result of the breach (*Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687C-E).

[23] In *MV* Snow Crystal *Transnet Ltd t/a National Port Authority v Owner of MV* Snow Crystal 2008 (4) SA 111 (SCA) at para [35] Scott JA said:

> " …….. to answer the question whether damages flow naturally and generally from the breach one must inquire whether, having regard to the subject-matter and terms of the contract, the harm that was suffered can be said to have been reasonably foreseeable as a realistic possibility."

[24] If one considers the subject matter and terms of the contract in the present matter, it was clearly reasonably foreseeable as a realistic possibility that a failure to pay bond instalments would result in foreclosure by the bank and a sale in execution of the property hypothecated in terms of the bond.

[25] In the result the following order is made:

[25.1] The appeal is upheld with costs.

[25.2] The judgment of the court *a quo* dismissing the appellant's claim with costs is set aside and substituted with the following order:

[25.2.1] The defendants are declared to be liable to the plaintiff for such damages as he may prove which were caused by the defendants' breach of the contract of employment with the plaintiff in failing to make payment of the arrear loan amounts due on the plaintiff's home loan account no […] held at Nedbank.

[25.2.2] The defendants are ordered to pay the costs of the trial on the issue of liability, including the costs which were reserved on 11 November 2010 and 31 January 2012.

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J M ROBERSON
JUDGE OF THE HIGH COURT

EKSTEEN J:-

I agree

_____
J W EKSTEEN
JUDGE OF THE HIGH COURT

MSIZI AJ-:

I agree

_____
N MSIZI
JUGE OF THE HIGH COURT (ACTING)

Appearances:

For the Appellant: Adv D H De la Harpe, instructed by Gordon McCune Attorney, King William's Town

For the Respondents: Adv M H Sishuba, instructed by the State Attorney, King William's Town