IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No.: 1819/2017

In the matter between:

SEDWIN INVESTMENTS (PTY) LTD Applicant

and

NATHAN ALEC DATNOW First Respondent

MARIA JOHANNA DATNOW Second Respondent

JUDGMENT

REVELAS J:

1. In this application the applicant seeks to enforce a settlement agreement it had concluded with two respondents on 7 May

2019. During May 2017 the applicant, as plaintiff instituted an action against the respondents (defendants) for the payment of four separate amounts advanced to the respondents as loans, plus interest on these amounts, and costs on the scale as between attorney and own client. The applicant sought the following orders:

1. Claim A:

    1. An order rectifying the written acknowledgement of debt, Annexure "B", by the substitution of the sum and words of R3 062 500.00 (Three Million Sixty Two Thousand Five Hundred Rand) and R3 000 000.00 (Three Million Rand) in paragraph 1.2 thereof;

    2. An order directing First Defendant to pay Plaintiff the sum of R3 250 000.00 (Three Million Sixty Two Thousand Five Hundred Rand) and interest thereon;

2. Claim B (in the alternative to Claim A, and only in the event

    of a finding that the agreement is illegal and void for non-compliance with the Consumer Protection Act):

1. Payment of R2 500 000.00 (Two Million Five Hundred Thousand Rand) and interest thereon;

3. Claim C:

1. An order directing First and Second Defendants to pay the sum of R1 325 000.00 (One Million Three Hundred and Twenty Five Thousand Rand) jointly and severally, the one paying the other to be absolved;

2. Interest thereon at 15.5% per annum from 28th February 2014 until date of final payment;

4. Claim D (in the alternative to Claim C, and only in the event

of a finding that the agreement is illegal or void, which is not conceded):

1. Payment of R1 025 000.00 (One Million and Twenty Five Thousand Rand);

2. Interest thereon *a temporae mora* at the prescribed rate of interest;

3. Costs of suit on the scale as between attorney and own client.

2. The claim for rectification of the agreement is not opposed on the pleadings and it was admitted that the sums of money referred to, were advanced and those repayments with which the respondents had been credited were not in contention.

3. The alternative claims B and D are enrichment claims, and applicant's case would have been that in the event of the agreement having been void for non-compliance with the National Credit Act, as the very least Applicant was entitled to repayment of the admitted capital sums which had been advanced together with interest thereon at the prescribed interest rate *a tempore morae*.

4. The total sums which had been advanced as loans by the applicant to the respondents together with *in duplum* interest would have been R7 050 000.00. At 15,5% per annum since February 2014 by the time of the settlement in May 2019. The interest on the capital, compounded monthly in terms of the parties' agreement, would have exceeded the *in duplum* limitation on interest, by some R600 000.00.

5. The capital sums were advanced to the first respondent, a businessman conducting business under the name Shawshank Construction, as bridging finance in respect of certain large construction contracts. The first respondent claims that he had concluded such contracts with the Department of Public Works, performed in terms of them and had not been paid in accordance with their agreements. This resulted in the need for the loans to himself and the second respondent, his wife. According to him they were divorced in 2010.

6. As can be gleaned from the many applications and postponements following the summons, the matter has a long history. The matter was eventually declared trial ready and set down for 7 May 2019. The agreement of settlement was finally concluded and signed following a period of negotiations which were recorded in writing and form part of the papers. Certain amendments were affected to the agreement by the first respondent who at the time represented both the respondents and was agreed to the applicant. The most important amendment was the reduction of the amount owed by the respondents from R7 100 000.00 to R7 000 000.00. Interest was amended to be at prime rate instead of 15,5% per month. The

agreement was signed and dated by the parties on 7 May 2019 although and was drafted on 3 May 2019.

7. The respondents, represented by the first respondent (two sets of attorneys having withdrawn - the latest on 1 April 2019) opposed the application to enforce the agreement on the basis that no settlement agreement was reached and if it were, the applicant had repudiated the agreement and that repudiation was accepted by the respondents.

8. According to the first respondent, the agreement was signed in error because they did not realise that the second respondent's initial capital exposure was only for R1 325 000.00 and it was never intended that she should jointly and severally with the first respondent be exposed to R7 000 000.00. The first respondent also argued that the agreement itself was only a counter proposal not countersigned by the applicant.

9. It is common cause on the papers that prior to the agreement sought to be made an order of court, the first respondent proposed that they settle on the basis that an immovable property owned by the respondents be transferred to the applicant. The value of the property was considerably more than the sum proposed, being in excess of R23 million. The applicant

was not amenable to this proposal. The first respondent thereafter agreed to the settlement amount proposed the applicant subject to a payment by the applicant to the respondents in the amount of R1 500 000,00. The first respondent stated he needed this money to rezone the property the respondents intended to transfer to the applicant. The applicant was not inclined to pay him.

10. It is common cause that after much correspondence was exchanged between the parties before the drawing up and signing of the agreement in question. The first respondent phoned the applicant's attorney (the deponent to the founding affidavit) on the late afternoon 6 May 2019 stating that he now wished to settle the matter - thus initiating the finalisation of the agreement - and after effecting the amendments referred to above, he emailed the agreement to the applicant's attorney at 18h00, confirming that he did so in a WhatsApp message. The attorney confirmed receipt thereof in a phone call. The flights of the legal representatives and witnesses from Cape Town who would have attended the trial if it proceeded were then cancelled. The matter was settled.

11. However, the following morning the first respondent indicated that that he wished the second respondent to be removed from

the agreement. The applicant's attorney stated that the applicant could not agree to this. Consequently the settlement agreement could not be made and order of court and the matter was removed from the roll. The first respondent stated that when the applicant's attorney refused to accede to his request, he understood "***from this that the Applicant's view was that there were no agreements between the parties and that the trial would proceed on 9 May 2019 on the pleadings and I was satisfied with that."*** In my view, that was a rather self-serving interpretation given to what had transpired between the parties during the previous few weeks and previous evening in particular. The applicant's attorney had done all and more that was required of him to ensure that the settlement agreement was properly drafted, concluded signed and could be made an order of court. That is clearly borne out by the correspondence attached to the founding affidavit and which is not in dispute.

12. The first respondent claimed in his answering affidavit that he was always *bona fide* in his dealings with the applicant. This statement is belied by the first respondent's conduct in the matter. In his answering affidavit and even at the latest pre-trial meeting held where he was present, he stated that he acted on behalf of the second respondent. The settlement agreement was

drafted and sent to him long before the trial. I find it most unlikely the second respondent's exposure was not fully considered by the two respondents before the agreement was concluded. In any event, the second respondent did not depose to a confirmatory affidavit to state her case in this regard. Furthermore, the applicant's attorney explained the amounts claimed and how they were arrived at in the applicant's papers.

13. More tellingly, if there had been no agreement finally concluded between the parties the previous evening of 6 May and finalised on 7 May 2019, the respondents would not have required the consent of the applicant to have the second respondent removed from the agreement which the first respondent initiated to finalise and agreed to the previous evening. The agreement was clearly not a counter proposal as the first respondent then alleged at the eleventh hour in an effort to resile from the agreement. The respondents are not in a position to assert that they do not owe the money in question to the applicant. They have never done so. After much litigation and attempts by the respondents to evade payment, the parties finally concluded a settlement agreement, despite the first respondent's attempts to resile therefrom and misleading the court. That should also justifies a punitive costs order.

14. In the circumstances the following order is made:

    1. The Settlement Agreement dated 7 May 2019, attached to the founding affidavit as Annexure CB1 is made an order of court.

    2. The first and second respondents are to pay the applicant's costs of the application on a scale as between attorney and own client.

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E REVELAS

Judge of the High Court

Appearances:

For the Applicant: Advocate R Stelzner, instructed by De Waal Boshoff Inc, c/o Kaplan Blumberg Attorneys, 1st Floor, Block A, Southern Life Gardens, 70 – 2nd Avenue, Newton Park, Port Elizabeth

For the Respondents: Adv Barnett, instructed by Van Heerdens Attorneys, 7 Bird Street, Central, Port Elizabeth

Date heard: 25 June 2020

Date delivered: 10 November 2020