IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO 431/03

In the matter between

SA BANK OF ATHENS LIMITED **Appellant**

and

MAY VAN ZYL **Respondent**

CORAM: **MPATI AP, FARLAM, MTHIYANE, VAN HEERDEN JJA et ERASMUS AJA**

Date Heard: 22 November 2004

Delivered: 21 February 2005

Summary: Summary judgment – order not sustainable where facts not fully canvassed in part due to the acceptance by both parties and the court *a quo* of the correctness of a High Court judgment subsequently found by the SCA to be incorrect. *Parate executie* not *per se* invalid – not in conflict with section 34 of the Constitution.

J U D G M E N T

AR ERASMUS AJA

AR ERASMUS AJA

[1] The adjudication of this appeal requires consideration of the proceedings in the court *a quo* viewed against the backdrop of developments in our law regarding the right of a creditor to realise the property of its debtor without first obtaining the sanction of the court. This type of extra-judicial execution is known in Roman Dutch law as *parate executie*. The vehicle that brings the question of the validity of that procedure before this court is the appeal against an order of summary judgment issued in the Johannesburg High Court against the appellant in favour of the respondent. (I refer to the parties as in the action proceedings and, where convenient, to the defendant as 'the bank'.)

[2] In her particulars of claim, the plaintiff narrates the circumstances which she avers gave rise to her instituting the action against the defendant. These are briefly as follows. While in a vulnerable psychological condition after the death of her husband, she was inveigled by Mr L C Joubert ('Joubert'), an insurance representative and 'financial advisor' in the employ of an insurance company ('Sanlam'), into investing money in a trust in which members of his family had interest. Without her knowledge, she was made a trustee of the trust. During October 1998 the defendant bank instituted action in the magistrate's court against the plaintiff for payment of R75 525,08 in respect of amounts allegedly owing by the trust on its cheque account. She was cited in her representative capacity together with the other trustees, as well as in her personal capacity, on the basis of a deed of suretyship allegedly

signed by her in favour of the bank. The plaintiff entered appearance to defend and, when the bank thereupon applied for summary judgment, she filed an affidavit resisting the application. Therein she deposed as follows. Early in 1998 Joubert requested her to sign certain documentation in connection with the business of the trust. She accompanied him to the bank where she found documents spread on a table. She signed these without reading their contents. She had no idea what she was signing. The nature of the documents was never explained to her. In particular, she was unaware that she was signing a deed of suretyship. She denied ever having the intention of binding herself to such a contract. Her affidavit was received by the defendant's attorneys on 23 November 1998. We were informed that the summary judgment application had not yet been finalised.

[3] After setting out the above historical background, the plaintiff proceeded to formulate her claim. She alleged that, while the opposed summary judgment application was pending in the magistrate's court, the defendant, acting without court sanction, called up and retained the proceeds of four investment policies held by her with Sanlam, as follows:

3 November 1998:	R 91 768,06
3 November 1998	41 175,38
29 December 1998	48 170,14
29 December 1998	25 793,42
Total	R206 907,00

[4] The plaintiff averred that the defendant had purported to act in terms of *parate executie* clauses contained in deeds of cession (of which she had no knowledge) whereby she had allegedly ceded the policies to the bank as security for the trust's alleged indebtedness. It was her case that those clauses were in conflict with s 34 of the Constitution[1] and therefore invalid, which meant that the defendant, in effecting *parate* execution of the policies, had unlawfully taken the law into its own hands. She claimed that the defendant was therefore obliged by law to pay her the amount of R206 907.00.

[5] The defendant defended the action. The subsequent application for summary judgment was resisted on an affidavit of an advances manager of the bank. The deponent stated that on or about 26 March 1998 the plaintiff ceded the four policies in favour of the defendant. She averred that 'from the aforesaid documents of cession and as a result of the Plaintiff's indebtedness to the Defendant, the Defendant was entitled to obtain payment in respect of the policies from SANLAM'. She stated that at the time the defendant was in possession of the relevant policies. She intimated that full legal argument would be presented to the court at the hearing of the application.

---

1. The Constitution of the Republic of South Africa Act 108 of 1996

[6] In his judgment, delivered on 28 February 2002, the learned judge (Spilg AJ) set out the history of the dispute between the parties. As to the defendant's dealings with the policies, he stated that the position in regard to the first two policies was unclear, but that at the time of the realisation of the last two investments in December 1998 the defendant was well aware of the plaintiff's defence as disclosed in the magistrate's court proceedings. He expressed strong disapproval of the defendant's actions:

> 'At the outset I find it difficult to use restrained language in describing the bank's conduct, particularly as it is conduct of a financial institution. Suffice that its conduct on the papers before me is disgraceful and for this reason I consider it appropriate that investigations be conducted into the matter by appropriate authorities.'

[7] The legal argument adumbrated in the defendant's answering affidavit (para [5] above) proved to be the submission that the defendant had, through the cessions *in securitatem debiti*, acquired 'out and out' ownership of the policies, which entitled it to deal with them at its will. The court *a quo* rejected the contention. (The point was not pursued at the hearing of the appeal and the merits thereof need not concern us.) Spilg AJ pointed out that since security is accessory to the main debt, it follows that until the existence of a disputed underlying obligation is determined by a court, the security cannot be realised and the cessionary who executes *parate* prior to such determination takes the law into its own hands.

[8] The plaintiff did not attach copies of the deeds of cession to her particulars of claim. She in fact claimed to have no knowledge of these

documents. Copies of the four cession agreements are, however, attached to the defendant's answering affidavit. They are identically worded. The relevant provision in each reads as follows:

> 'I hereby appoint you irrevocably and *in rem suam* as my attorney and agent to apply for the surrender, to realise or otherwise deal with the policy in your absolute discretion in the event of my failure to pay any amount which I may owe or in which I may be or become indebted to you and to apply the proceeds of such surrender, realisation or other dealing to my aforesaid debt …'.

[9] Spilg AJ accepted the plaintiff's contention that the clause was *contra bonos mores* and therefore invalid in that it constituted 'a classic *parate executie* provision'. He stated that an agreement that allows a person to be the arbiter of the fact whether a debt is owing by another without due process of law and which denies access to the courts, offends the provisions of s 34 of the Constitution (para [11] below). He referred to *Chief Lesapo v North West Agricultural Bank* 2001 (1) SA 409 (CC); *First National Bank of SA Ltd v Land and Agricultural Bank of SA* 2000 (3) SA 626 (CC) and the application of those decisions in *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 (1) SA 251 (E)). He accordingly held that the defendant's actions in realising the plaintiff's investments (para [3] above) was invalid, which meant that there was no bona fide defence to the plaintiff's claim recognised by law and that she was therefore entitled to summary judgment.

[10] *Parate* execution has long been acceptable under the common law (*Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531 at 541 – 547), provided that

the terms of the agreement authorising the procedure are not unconscionable or incompatible with public policy (*Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 13J–14A), for example (a) entitling the creditor to determine the fact of the debtor's default, or (b) authorising the creditor to seize the debtor's property without the court's imprimatur (*Nino Bonino v De Lange* 1905 TS 119 at 124).

[11] The core principle of the common law that no person is entitled to take the law into its own hands – now no longer inhibited by statutory exception – is expressed as a fundamental right in s 34 of the Constitution:

> 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

The Constitutional Court, in applying this section in *Lesapo*, declared that a statutory provison that permitted a creditor to seize a defaulting debtor's property, and to sell it in defrayal of the debt, without recourse to a court of law,[2] was unconstitutional and invalid - notwithstanding the fact that there was no dispute as to the debtor's default. In *Findevco*, the Eastern Cape High Court relied on that decision in declaring invalid a clause in a general notarial bond that authorised the creditor to take possession of the debtor's movable property and to dispose thereof in satisfaction of the debt. The learned judge reasoned from the general to the particular, as follows: legislation authorising *parate executie* is unconstitutional, therefore the common law cannot countenance such a stipulation in a contract; consequently the stipulation in

2. Section 38(2) of the North West Agricultural Bank Act 14 of 1981

the particular provision authorising *parate* execution was unconstitutional. The judge, in dealing with counsel's submission that the court should confirm the rule in that the respondent did not oppose the application and the applicant was not seeking to by-pass the courts, stated (at 256H-I):

> 'All these submissions, in my view, beg the question. If the clause in the bond which purports to allow the sale of the movable property is valid and not disputed, there is no issue between the parties which needs to be determined by me. If, however, the clause in the bond is invalid (as I consider it is), then it cannot logically be validated by asking the Court to ignore its constitutional invalidity and give effect to it.'

[12] That then, broadly speaking, was the position in the case law when the plaintiff on 29 November 2001 instituted the present action against the defendant. Counsel for the defendant informed us that the particulars of claim (which he settled) were drafted on the basis of the law as stated in *Findevco*. (This is reflected in the particulars of claim.) He informed the court, further, that at the hearing of the application for summary judgment, the parties – as well as the court – accepted that the law was settled on that basis. (This is reflected in the defendant's answering affidavit, as well as in the judgment of the court *a quo* in its finding in favour of the plaintiff.) The defendant's application for leave to appeal was refused, but its petition for leave to appeal to this Court was granted. The grounds of appeal were directed at the rejection by the court *a quo* of the contention upon which the defendant had relied at the hearing of the summary judgment application (para [7] above). That court's unqualified acceptance of the outright constitutional invalidity of *parate executie* (as per *Findevco*) was not challenged in the notice of appeal.

[13] In the meantime it appeared that *Findevco* was not the last word on the validity of *parate executie*. Susan Scott in 'Summary Execution Clauses in Pledge and Perfecting Clauses in Notarial Bonds' 2002 (65) *THRHR* 656- 664 was the first to question the correctness of the decision (as far as I am aware). It is not necessary here to deal with the arguments raised by the learned author, as the issue was thereafter addressed by this court in *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA). The judgment did not turn on the validity of *parate* execution clauses, but as the constitutionality of the procedure had been the main point of argument before the court, Harms JA was led to state (para 13):

> '… I find it difficult to extend the proscription of these statutory provisions by the Constitutional Court to *parate executie* of movables which are lawfully in the possession of the creditor. This procedure does not authorise a creditor to bypass the courts and "seize and sell the debtor's property of which the debtor was in lawful and undisturbed possession". It does not entitle the creditor "to take the law into his or her hands". It does not permit "the seizure of property against the will of a debtor in possession of such property". And since the debtor may seek the protection of the court if, on any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor acted in a manner which prejudiced him in his rights, the creditor cannot be said to be the judge in his own cause.' (Footnotes not included.)

He added (para 15) that it followed that the judgment in *Findevco*, finding that the law relating to *parate executie* of movables is unconstitutional, was wrong.

[14] In *Juglal NO v Shoprite Checkers (Pty) Ltd* 2004 (5) SA 248 (SCA) this court upheld the validity of a notarial covering bond which entitled the creditor, in the event of default on the part of the debtor, to take possession of the debtor's business and assets as security for the debt, to sell the assets and to apply the proceeds in settlement of the debt. The court *a quo* had granted the creditor an order perfecting its security. The judge (Hurt J) had expressly declined to follow *Findevco*. Heher JA (speaking in this court in the subsequent appeal) commented (para 9) that the refusal was justified by the decision in *Bock*. Hurt J had further stated:

> 'In summary, the common law, insofar as stipulations for *parate* execution are concerned, is that stipulations, which are not so far-reaching as to be contrary to public policy, are valid and enforceable; that, as a matter of practice, creditors seeking to enforce such stipulations take the precaution of applying for judicial sanction before doing so; and that the debtor can avail himself of the court's assistance in order to protect himself against prejudice at the hands of the creditor.'

Heher JA commented that this exposition seemed to him to be a correct summary of the present state of the common law, with the one qualification that the 'matter of practice' referred to by the judge was in fact a constitutional requirement. He declared (para 11) that the common law (as stated above) does not limit the right of access to the courts. 'Nor', he added, 'does it fall short of the spirit, purport or the objects of the Bill of Rights'. He continued thus (para 12):

> 'Because the courts will conclude that contractual provisions are contrary to public policy only when that is their clear effect (see the authorities cited in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 8C-9G*)* it follows that the tendency of a proposed transaction towards such a conflict (*Eastwood v Shepstone* 1902 TS 294 at 302*)* can only be found to exist if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to their tenor. (It may be that the cumulative effect of implementation of provisions not individually objectionable may disclose such a tendency.) If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent. In such event the creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct but the contract itself will stand. '

The court considered the facts of the matter in the light of this statement of the law and dismissed the appeal.

[15] Notwithstanding what was said in the *Bock* and *Juglal* judgments, counsel for the plaintiff bravely contended that *Findevco* was correctly decided and should be upheld. He submitted that the dictum of Harms JA to the contrary was clearly wrong, and was in any event delivered *obiter*. I am, however, unpersuaded that *parate* execution is *per se* unconstitutional or offensive to public policy. I find that the court *a quo* erred in holding that the deeds of cession allowed the bank to be the arbiter of the fact whether the debt was owing (compare: *Senwes Ltd v Muller* 2002 (4) SA 134 (T)). The

cession agreements do not expressly authorise such action on the part of the bank, nor is this objectionable feature of *parate* execution implicit in the stipulations. Nor do the particular clauses purport to allow the bank to by-pass the courts in a dispute regarding the existence or validity of the cession agreements.

[16] It does not follow, however, that because the provisions in the cession agreements allowing for *parate* execution are valid, the defendant's actions in purported reliance thereon were lawful. The severe censure by Spilg AJ of the bank's conduct (para [6] above) may well prove to be justified. Counsel for the defendant submitted, however, that the judge was not entitled to make those findings on the papers before the court. She pointed out that the court based its judgment on factual averments in the plaintiff's particulars of claim, not on evidence. It is true that the averments were not challenged in the defendant's answering affidavit and that usually in summary judgment proceedings that would be taken as admission of those allegations. The present matter is however not usual. The proceedings in the court *a quo* were from their commencement to their conclusion misdirected by the mistaken acceptance by the parties and the court of the correctness of the judgment in *Findevco*. On that decision, the plaintiff's averment that *parate executie* is invalid *per se*, could not be gainsaid on any grounds of law or fact. Perhaps the defendant should have answered the averments in the particulars of claim relating to its conduct. Counsel for the defendant was constrained to concede that the affidavit resisting summary judgment 'is unfortunately not as comprehensive as it should have been'. The affidavit, however, was not

directed at justifying the defendant's *parate* execution of the plaintiff's property, but was designed to accommodate the legal argument which was presented on behalf of the defendant in the court *a quo*, but which was not persisted with at the hearing of the appeal (para [7] above). In the circumstances, the defendant's failure to present its case fully and properly in the answering affidavit is to some extent understandable. The determination of the lawfulness of the defendant's conduct requires a value judgement which can properly be made only upon consideration of all the relevant facts and attendant circumstances. These were not before the court *a quo*. Summary judgment is a drastic remedy granted only where the defendant has no bona fide defence. It would be unfair and therefore improper to leave standing a summary judgment which was given without consideration of all the relevant facts and circumstances, where those facts were not placed before the court by the defendant due to its misunderstanding of the law (a misunderstanding shared by the plaintiff and the court) apparently occasioned by its acceptance of the correctness of a judgment of the High Court subsequently held by this court to be incorrect.

[17] Counsel for the defendant contended, further, that the particulars of claim are excipiable in that the plaintiff failed to make out a case for the damages which she claimed from the defendant. (This point was not raised in the court *a quo*, nor is it covered by the grounds of appeal.) Counsel for the plaintiff countered by contending that the action was not one for damages, but was based on the *actio ad exhibendum*. He advanced the contention for the first time while on his feet in this court. It was not dealt with by the court *a*

quo. It was not canvassed in the heads of argument and was certainly not fully argued in this court. I am therefore reluctant to make a finding on the question. It is, moreover, not necessary for me to do so in view of my earlier conclusions (para [16] above).

[18] The court's reasons for allowing the appeal, viewed in the historical context of the proceedings, materially affect the question of the costs of the appeal. The proceedings, from their inception in the court *a quo* and up to the portals of this court, turned on the legal effect of the *parate executie* clauses in the cession agreements (para [7] above). The real issues were identified only during the argument of the appeal in this court. It appears that the focus of the dispute is not the constitutional validity of *parate executie* clauses (which has been settled in *Bock* and *Juglal*), but the lawfulness of the appellant's actions in the purported execution of those provisions of the deeds of cession. However, the appeal succeeds not *because* of the appellant's explanation of its actions, but *despite* its failure to set out the relevant facts and circumstances in its affidavit opposing summary judgment (para [16] above). In these special circumstances, it is fair and therefore proper that the court depart from the usual practice of ordering that costs follow the event. The parties share the blame for the misdirection of the proceedings and the costs order should reflect that circumstance.

[19] After judgment was reserved in this appeal, the appellant brought an application for an order that two documents contained in the papers be struck from the record. Although these documents were referred to at the hearing of

the appeal, they have had no effect on my decision. There is therefore no need to delay further the delivery of the judgment pending the outcome of the application.

[20] In the result, the appeal succeeds, with no order being made as to costs of appeal. The order of the court *a quo* is set aside and the following order is substituted therefore:

'1. The application for summary judgment is refused.

2. The defendant is granted leave to defend.

3. The costs of the application for summary judgment are to be costs in the action.'

AR ERASMUS

ACTING JUDGE OF APPEAL

CONCUR:

MPATI AP
FARLAM JA
MTHIYANE JA
VAN HEERDEN JA