

SOUTH AFRICA / JUDGMENT

Edu-U-College (Port Elizabeth) v Transnet Limited and Another (135/2013, 212/2013, 62/2014, 1729/2011, 4397/2015) [2017] ZAECPHC 18 (23 February 2017)

[2017] ZAECPHC 18

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

S M Mbenenge

CASE / FILE NUMBER

135/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH)

Case

Nos: 135/2013

212/2013

62/2014

1729/2011

4397/2015

In

the matter between:

EDU-U-COLLEGE
(PORT
ELIZABETH)
Applicant
(Registration
No: 1995/011813/08)
and
TRANSNET
LIMITED
First
Respondent
[Registration
No: 1990/00090/06]
THE

SHERIFF OF THE HIGH COURT,
PORT
ELIZABETH
Second
Respondent

JUDGMENT

MBENENGE J:

- [1] At all times relevant hereto, the applicant occupied two buildings colloquially referred to as Payne's Building and the Harbour Building located in Flemming Street, Central, Port Elizabeth, in terms of lease agreements the applicant had concluded with the first respondent. The applicant conducted the business of a learning institution to learners in the middle to lower income groups from these premises.
- [2] In the course of time, the first respondent fell into arrears in its payment of rentals. Litigation relating primarily to the applicant's indebtedness to the first respondent for arrear rentals ensued.
- [3] The various proceedings launched by the first respondent against the applicant resulted in the first respondent eventually obtaining cost orders against the applicant. The details of these orders are embodied in the grid set out hereunder.

Case Number Amount 135 & 212/2013 R354 523.15 62/2014 R182 00.67 729/2011 R15 733.78
4397/2015 R9 606.13 Total R561 863.73

- [4] The various cost orders were taxed by agreement during September 2015.
- [5] Initially, the applicant and the first respondent entered into a settlement agreement providing, inter alia, for the payment of arrear rentals and the eviction of the applicant from Payne's and the Harbour Buildings.
- [6] It also came to pass that the parties eventually concluded a settlement agreement providing, inter alia, for the determination of the applicant's indebtedness to the first respondent pursuant to the lease agreements.
- [7] In so far for as relevant hereto, the settlement agreement referred to in paragraph [6] above provides:

"3. The parties respective auditors will endeavour to determine the amount owed by the Respondent to the Applicant, if anything, in respect of the lease of Payne's Building and the Harbour within fifteen working days of the Respondent's auditors being provided with all the necessary documentation requested by them.

4. In the event of the party's respective auditors being unable to reach agreement within ten working days as to the amount owing, if anything, the parties agree that the Chairman of the Port Elizabeth District Region of the South African Institute of Chartered Accountants shall within five days appoint an independent auditor to determine the said amount, whose decision will be final and binding on the parties.
5. In respect of the eviction application the Respondent hereby undertakes to vacate Payne's Building and the Harbour Building by no later than 31 July 2013.
7. The Respondent will be liable to pay monthly rental in respect of the Payne's Building and R33 000 00 in respect of the Harbour Building until such time as it vacates both buildings.
9. If any amount is found to be due by the Respondent to the Applicant and/or Portnet Ltd it will be settled in full by 31 December 2013."
- [8] An arbitrator has been appointed, pursuant to the settlement agreement, to determine the extent of the applicant's

indebtedness to the first respondent. This court has pronounced that the arbitrator must determine the indebtedness of the applicant in respect of outstanding rental payments for Payne's Building from 1 September 2011 until the date that building was vacated, and the indebtedness of the applicant towards the first respondent in respect of the Harbour Building from the date of commencement of the relevant rental agreement until the date on which the first respondent vacated the Harbour Building.[1]

- [9] The applicant believes that the audit exercise to be undertaken by the arbitrator might reveal that the applicant is not indebted to the first respondent, by reason thereof that the first respondent failed to allocate certain payments made by the applicant and incorrectly charged value added tax on municipal rates in respect of the subject buildings.
- [10] On the one hand, the first respondent is bent on executing the cost orders referred to in paragraph [3] above, whilst the applicant, on the other, entertains the belief that the applications that generated the cost orders might end up being proven (during the arbitration process) to have been vexatious from inception.
- [11] The order being sought by the applicant is one staying the warrants of execution issued in respect of the cost orders, pending the finalisation of the arbitration proceedings.
- [12] The application seems to have been triggered, inter alia, by the view held by the applicant that the first respondent has elected to execute the warrants of execution in question in an attempt to cripple the applicant financially so as to avoid the inevitable outcome of the arbitration in terms of which the first respondent will be proven to be indebted to the applicant in an amount exceeding R1 600 000.00.

- [13] As a further bow to its arrow, the applicant alleges that the first respondent has delayed the execution of the orders for more than 10 months, which serves to illustrate that the first respondent has not deemed it necessary to protect itself from possible prejudice which might be posed by the delayed execution of the relevant warrants.
- [14] The first respondent contends that there exists no ground in respect of which any possible future claim by the applicant can be set off against the taxed costs; there is no liquidated debt, fully due to the applicant; the money value of the alleged debt has not been ascertained and is not capable of prompt ascertainment; the proceedings that have been referred to arbitration do not constitute any counter-claim against any action by the first respondent.
- [15] The first respondent's contentions, persisted in by Mr Rautenbach at the hearing of this matter, deserve of being considered closely.
- [16] The applicant is, in essence, raising set-off against the first respondent. The fact that a claim for costs has been extinguished by set-off is a ground for staying execution in respect of those costs.[2] The debt upon which set-off is based must, however, be liquidated. About this Innes CJ (as he then was) once said:[3]
- "The law requires that a debt which is desired to oppose by way of set-off must be of a liquidated nature. It need not be liquid in the sense in which that word is now used in our practice. According to Vinnius (Select Juris Quaest, 1 c. 50), if not admitted by the other side it must be capable of easy and speedy proof. Pothier (Obligations, 3, c 4 sec 2), says a debt is liquidated when it is evident that it is due, and to what amount – cum certum est an quantum debeatur; he adds that a disputed debt cannot be opposed in compensation unless the person who opposes it has proof at hand, and is in a position to justify his claim promptly and summarily. (See also: Code 4, 31, 14, par 1: Burton's Ins Law p 69, Burge vol 3, p 807; Kruger v Van Vuuren's Executor 5 SC 162)."*
- [17] The claim of the applicant does not constitute a liquidated claim; it is an unliquidated claim to be determined by the arbitrator in future.
- [18] It remains to consider whether it is possible for me to exercise my discretion in favour of staying the execution of the relevant warrants on other bases.
- [19] Rule 45A of the Rules of Superior Court Practise (the Rules) gives the court a discretion to suspend the execution of any order for such period as it may deem fit. The court has always exercised its inherent power to suspend the execution of its orders in appropriate circumstances. It is a discretion that must be exercised judicially but which is not otherwise limited. Apart from instances that are governed by statute,[4] the numerous grounds upon which execution has been stayed include the following:
- (a) pending payment of the amount of the judgment in instalments;
 - (b) pending an action by the husband for divorce on the grounds of the wife's adultery;
 - (c) pending legislation;

- (d) pending interpleader proceedings; and
- (e) where ejectment had been ordered.

[20] Whilst the courts have previously been loath to grant a stay of execution to merely avoid injustice and inequity, [5] the courts have now become benevolent, and the general rule is to grant a stay of execution where real and substantial justice requires such a stay or, put differently, where injustice will otherwise be done. [6]

[21] What the applicant is seeking is an order staying execution with a view to enabling the applicant to await the result of the arbitrator in the hope that he will decide in the applicant's favour and find that the applicant does not owe the first respondent any money. The applicant says that if there is no stay it will suffer irreparable prejudice and harm. Much as there is no certainty that the arbitrator will decide in the applicant's favour and the alleged prejudice and irreparable harm may be said to be speculative, the court is not at this stage concerned with the merits of the underlying dispute-the sole enquiry is simply whether the causa is in dispute.[7]

[22] I find that an injustice would be done were I not to grant the relief sought. All impediments to the final disposal of the arbitration proceedings relevant to this matter have been removed. It remains for the arbitrator to reconvene the proceedings and bring same to a logical conclusion.

[23] The applicant sought a costs order against the first respondent in the event of the latter opposing the application. With the applicant having attained substantial victory, nothing militates against an order being granted directing the first respondent to pay the costs occasioned by the opposition of this application. The engagement of two counsel by the applicant was not warranted.

[24] In all these circumstances, I grant the following order:

1. The execution of cost orders in case numbers 135/2013; 212/2013; 62/2014; 729/2011 and 4397/2015 is stayed pending the finalisation of the arbitration proceedings involving the applicant and the first respondent instituted pursuant to the order of this court under case number 135/2013 granted on 28 March 2013.
2. The first respondent shall pay the costs occasioned by the opposition to this application

S M MBENENGE

JUDGE OF THE HIGH COURT

Counsel for the Applicant : B C Dyke SC (with him, A C Barnett)

Instructed by

: Listen Brewis & CO

35 Albany Road

Central

PORT ELIZABETH

Counsel for the First Respondent : J G Rautenbach SC

Instructed by

: Siya Cokile Inc. Attorneys

16 Clyde Street

Date heard

: 9 February 2017

Judgement

delivered : 23 February 2017

[1]

Transnet Ltd vs Ed-u-College (Port Elizabeth) & Another (unreported) decision of the ECLD, Port Elizabeth by Mbenenge J, delivered on 21 February 2017, under case no 3618/2016

[2] Whelan v Oosthuizen 1937 TPD 304

[3]

Treasurer General v Van Vuuren 1905 TS 582 at 589 [4] Section 5(1) of the Insolvency Act 24 of 1936; section 30 of the Administration of Estates Act 66 of 1965 and Rule 49 (11) of the Rules

[3]

Treasurer General v Van Vuuren 1905 TS 582 at 589

[4] Section 5(1) of the Insolvency Act 24 of 1936; section 30 of the Administration of Estates Act 66 of 1965 and Rule 49 (11) of the Rules

[5]

See for example Fisheries Development Corporation of South Africa LTD v Jorgensen and Another: Fisheries Development Corporation of South Africa LTD v AW3 Investments (PTY) LTD and Others (1979 (3) SA 1331 (W), where Nicholas J held: “Mr Morris submitted in the alternative that it was not necessary for the defendants, in order to obtain a stay of the plaintiff’s

action, to show that it was vexatious or an abuse of the process of the Court, but that a stay could be granted by the Court in the exercise of its inherent discretion to avoid injustice and inequity. The Courts do not however act on abstract ideas of justice and equity. They must act on principle. CF the Western Assurance Co case supra at 275. And see the remarks of Innes CJ in Kent v

Transvaalsche Bank 1907 TS 765 at 773-774: ‘(The appellant) also asked us to stay the proceedings on equitable grounds, urging that we had an equitable jurisdiction under the insolvency law. The Court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law. Using the word ‘equity’ in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the principles of the Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all.’ ”

[5]

See for example Fisheries Development Corporation of South Africa LTD v Jorgensen and Another: Fisheries Development Corporation of South Africa LTD v AW3 Investments (PTY) LTD and Others (1979 (3) SA 1331 (W), where Nicholas J held:

“Mr Morris submitted in the alternative that it was not necessary for the defendants, in order to obtain a stay of the plaintiff’s

action, to show that it was vexatious or an abuse of the process of the Court, but that a stay could be granted by the Court in the exercise of its inherent discretion to avoid injustice and inequity. The Courts do not however act on abstract ideas of justice and equity. They must act on principle. CF the Western Assurance Co case supra at 275. And see the remarks of Innes CJ in Kent v Transvaalsche Bank 1907 TS 765 at 773-774:

‘(The appellant) also asked us to stay the proceedings on equitable grounds, urging that we had an equitable jurisdiction under the insolvency law. The Court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law. Using the word ‘equity’ in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the principles of the Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all.’ ”

[6]

Soja (Pty) Ltd v Tucker and Development Corporation (Pty) Ltd 1981

- (2) SA 407 (W) at 411E-F; Strime v Strime 1983 (4) SA 850 (C) at 852 B; Bestbier v Jackson 1986 (3) SA 482 (W); Santam Ltd v Norman 1996
- (3) SA 502 (C) at 505 E-F 2001(1) SA 292 (C) at 300 B; Standard Bank of South Africa Ltd v Malefane: In re Malefane v Standard Bank of South Africa Ltd 2007 (4) SA 461(Tk) at 466 A-D

[7]

Gois t/a Shakespear’s Pub v Van Zyl 2011 (1) SA 148 (LC) at 155H-156B

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Prepared on 11 October 2026 · Esheria