

SOUTH AFRICA / JUDGMENT

Engen Petroleum (Pty) Ltd v Sash Productions (Pty) Ltd t/a Sash Logistics (5244/2024) [2024] ZAMPMHC 57 (18 October 2024) [2024] ZAMPMHC 57

COURT

Middelburg High Court, Mpumalanga

BEFORE

Malangeni

CASE / FILE NUMBER

5244/2024

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(MPUMALANGA DIVISION,
MIDDELBURG)

CASE NO: 5244/2024

(1)

REPORTABLE:NO

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED: YES

DATE 18/10/2024

SIGNATURE

In the matter between: ENGEN
 PETROLEUM (PTY) LTD
 APPLICANT
 and
 SASH
 PRODUCTIONS (PTY) LTD T/A
 RESPONDENT
 SASH
 LOGISTICS
This judgment was
handed down electronically by circulation to the parties and/or
parties' representatives by email. The date
and time for
hand-down is deemed to be 18 October 2024 at 12:00.

JUDGMENT

MALANGENI AJ:

INTRODUCTION

1. The applicant has filed a notice of motion seeking the following relief:
 - 1.1 Non-compliance with the forms of service provided for in rule 6 of the uniform rules of court be condoned and that the matter behaved as one of urgency in terms of rule 6 (12) hereof;
 - 1.2 That the applicant is authorized to, for the purposes of perfecting its security in terms of:
 - 1.2.1 General notarial covering bond with number; BN 5[...]
 - 1.2.2 special notarial covering bond with number; BN 5[...]
 - 1.3 To enter upon the respondents premises or any other place where any of the respondents movable property, corporeal or incorporeal and the following vehicles as identified in paragraph 2.2.1 to 2.2.39 of the applicant's notice of motion are situated. The applicant refers to those items as the hypothecated property.
 - 1.4 That the applicant is authorized to take possession of all or any of the hypothecated property and to retain such possession for as long as the applicant may deem fit to sell and dispose of the hypothecated property or any portion thereof, in such terms as the applicant may deem fit.
 - 1.5 That possession of the hypothecated property be obtained and exercised by the sheriff of this honorable court in one or more of the following methods:
 - 1.4.1 the compiling of an inventory of all the hypothecated property; and or,
 - 1.4.2 the removal of any or all of the hypothecated property to a location identified and instructed by the applicant.

1.5 That a rule nisi be issued calling upon the respondent and all interested parties to show cause on at 10h00 or as soon as thereafter as the matter may be heard as to why the following order should not be made final.

1.6 Judgment against the respondent in the amount of R3 308 498.07 [Three million and three hundred and eight thousand four hundred and ninety-eight rands and seven cents] together with interest on the aforesaid amount, plus interest thereon calculated at the rate of 12, 25% per annum, compounded monthly from 1/8/23 to date of payment or collection Commission of 10%.

1.7 the cost of the application be paid by the respondent on an attorney and client scale.

1.8 granting the application such further and/or alternative relief as the honourable court may deem fit.

BRIEF BACKGROUND

2. The applicant is a manufacturing marketer and a bulk distributor of petroleum, diesel and chemical products. On or about the 9 December 2019 and at Witbank, the applicant and the respondent entered into a bulk consumer agreement. In terms of that agreement the applicant supplied the respondent with fuel related products to the value of R3 308 498.07.
3. The respondent breached the terms of the agreement by failing to pay the aforesaid amount. On 1 August 2023, the respondent signed an acknowledgment of debt offering to pay the amount due on 12 monthly instalments starting from 25 August 2023 and thereafter on the 25th day of each consecutive months until the whole debt due is fully paid. It is clear that the respondent failed to honor the terms of the acknowledgement of debt.
4. On or about 13 October 2020 and at Witbank, the director of the respondent, Sizwe Trevor Bonale executed a suretyship in favor of the applicant, for the indebtedness of the respondent to the applicant. The latter bound himself in favour of the applicant as surety in solidum and co-principal debtor with the respondent for the due and punctual payment to the applicant of all monies which at any time may be owing by the respondent to the applicant from any cause howsoever arising.
5. On or about 11 August 2023 and at Witbank, the respondent signed an acknowledgement of debt, acknowledging being indebted to the applicant in the sum of R2215997.75 and arranged to settle the outstanding amount in 12 monthly installments but such arrangements did not materialize.
6. On 13 October 2023, the respondent passed and registered, under BN 5[...], a special notarial bond in favour of the applicant. The respondent, in terms of this bond, hypothecated the movable assets appearing on page 26 off the indexed bundle, starting from paragraph 24.1 to paragraph 24.39 of page 31.

7. Again, on 13 October 2023, the respondent registered a general material covering bond under BN 5[...] in favour of the applicant.
8. From the applicant's founding affidavit, it is clear that the respondent is still indebted to the applicant.

URGENCY AND EX PARTE

9. The applicant covers the grounds of urgency on paragraphs 37 to 39 of its founding affidavit couched as follows:

"37: the applicant is seriously concerned over the respondent's ability to trade itself out of its present financial predicament. The applicant furthermore has no information in respect of other creditors of the respondent and/or the extent of such further

indebtedness.

38: It has become vitally important that the applicant secures its position, in relation to any attempts made to place the respondent into liquidation and or business rescue. The respondent's poor financial position furthermore creates a real possibility of one of its other creditors initiating proceedings to have the respondent liquidated. Accordingly, the applicant requires the relief claimed herein in order to secure its claim against the respondent.

39: It is important to further note that the respondent's business is that of transport and logistics through the use of trucks. It goes without saying that such trucks can be moved and or hidden or disposed of with minimal effort, all of which in an attempt to defeat the applicant's rights. Consequently, the honourable court is requested to consider the application on an ex parte basis as service of this application may result in this application being rendered academic in that the applicant may be unable to attach any assets of the respondent."

THE APPLICABLE LAW

10. Urgent applications are governed by rule 6(12) of the uniform rules of court. Rule 12(a) provides that in urgent applications, the court may dispense with forms and service provided for in these rules and may dispense with forms and service provided for in these rules and may further dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable in terms of these rules) as it deems fit.
11. Subrule 12(b) provides that in every affidavit filed in support of any application under paragraph(a) of this subrule, the applicant must set forth explicitly the circumstances which is averred and which render the matter urgent and the reasons why the applicant claims that it could not be afforded substantial redress at a hearing in due course.
12. In *Chung-Fung (pty) ltd v Anchor Projects limited*,^[1] in paragraph 18, the court stated that:

“In terms of rule 6(12) an application is considered “urgent” where a litigant could not obtain substantive redress at a hearing in due course. If the redress would not be substantive in due course, the metaphors to be determined as a matter of urgency. As said by the Supreme Court of appeal in Commissioner, South African Revenue Services v Hawker Air Services (PTY) LTD, South African revenue services v hawker aviation partnership and others 2006(4) SA 292 (SCA) AT (9) that...’urgency is a reason that may justify deviation from the times end forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief”

13. I found the urgency dealt with under rule 8 of Labour Court rules having the same ingredients as rule 6(12) of the Uniform Rules of Court. The general principle dealing with urgency was extensively dealt with in *Jiba v Minister of Department of Justice and Constitutional Development and Others*[2] as follows:

“Rule 8 of the rules of this court requires a party seeking urgent relief to set out reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees to which the ordinarily applicable rules should be relaxed, is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules”

14. It is the duty of the applicant to satisfy the Court that it would not be afforded substantial redress in due course if it is not granted the urgent relief it seeks. In *Maqubela v SA Graduates Development Association and others*[3] it was stated that:

“Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all circumstances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant to adequately set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why relief is necessary...”

ANALYSIS

15. The applicant’s legal representative addressed this court verbally and through written heads of arguments in terms of urgency and a need of the applicant to have control over moveable assets of the respondent. These submissions helped me a lot in making an informed decision.
16. I am alive to the fact that nothing limits or bars the owner of the notarial bond in dealing with the assets in any manner. This means that he can sell, dispose of and or pledge with them. In *Pick and Pay Retailers Proprietary Limited v Kemptongate Foodlane Proprietary Limited and 9 others*[4], the court said in paragraph 2:

“The effect of general notarial bonds is trite. The holder of a general notarial bond does not enjoy a real right. The holder of a general material bond does not enjoy a real right of security in the assets subject to the bond. There is nothing preventing the owner from dealing with and disposing of the assets subject to the natural bond, or of bonding them to another creditor. The creditor cannot prevent an alienation or pledge of the assets subject to the bond, cannot follow up the property in the hands of the acquirer

and cannot prevent a judicial attachment. The rights of a bondholder as observed in Joubert (ed) The Law of South Africa volume 17 (1st reissue) paragraph 517 of importance mainly upon insolvency.”

17. On the same breath, the counsel for the applicant referred this Court to Contract Forwarding (Pty) Ltd v ChesterFin (Pty) Ltd and others[5]. The Supreme Court of appeal found that the right in question, pledge, was a real right which was established by means of taking possession and not by means of an agreement to pledge. The bondholder who obtains possession first thereby establishes a real right. Once a creditor obtained possession lawfully, the pledge was perfected.

18. Considering what has been brought before this Court, I am not satisfied that the applicant's application meets the requirements of urgency on the following grounds:

18.1 Nothing has been placed on record that there are creditors who threatened and/or are threatening to place the respondent into liquidation and/or business rescue. It is trite when a business is placed on liquidation, its creditors would be informed or notified accordingly. Therefore, applicant is one of the creditors to benefit from this notification.

18.2 No evidence was placed on record that the respondent has attempted or started in removing or hiding and or disposing the trucks that form part and parcel of the notarial bond. I am aware that the bondholder does not have a real right over the hypothecated property until he gains possession of the property in question. However, I do not know what informed the applicant that the respondent may dispose of, destroy or hide the assets. The applicant failed to come up with reasons to satisfy this Court as to why the respondent would act in that fashion.

19. Furthermore, what proves that applicant will have substantial redress in the future is the following:

19.1 Paragraphs 4 of the Acknowledgment of Debt and Undertaking to pay[6] refers the applicant to the Magistrate's Court to obtain default Judgment for the outstanding balance. It means that in terms

of the acknowledgement of debt the applicant may approach the Magistrate's Court for the relief referred to.

19.2 Furthermore, Sizwe Bonale has signed a surety in favour of the applicant for the due and punctual payment of all monies as now or may hereafter be owed by the respondent to the applicant. This means that Sizwe Bonale binds himself as a co-principal debtor with the respondent as a principal debtor. This agreement is still in force. With the issue of suretyship alone, it means that applicant will be able to sue the co-principal debtor in the event of failing to recover the amount owed or due from the principal debtor.

20. It is trite that a contract of suretyship is secondary to the contractual relationship between the principal debtor and the creditor. In Van Zyl v Auto Commodities (pty) Ltd[7] the SCA held that:

“It follows from the accessory nature of the surety’s undertaking that the liability of the surety is dependent on the obligations off the principal debtor. A consequence of this is that if the principal debtor’s debt is discharged, whether by payment or release, the surety’s obligation is likewise discharged. If the principal debtor’s obligations are reduced by comprise, the surety’s obligation is likewise reduced. If the principal debtor is afforded time to pay, that ensures the benefit of the surety. If the claim against the principal debtor prescribes, so does the claim against the surety. This will be subject to any terms of the deed suretyship that preserve the surety’s liability notwithstanding the release or discharge of, or any benefit or remission afforded to the principal debtor”

21. The law dictates that an applicant seeking urgent relief must set forth explicitly in its affidavit reasons why the matter is urgent. The affidavit by the applicant lacks clear reasons for the relief sought on urgent basis. Put differently, I cannot find any degree of urgency, the applicant dismally failed to set out facts that establish absence of substantive redress at a hearing in due course. It is on that basis that the issue of urgency falls away in these proceedings.
22. The application in question is not opposed, therefore I see no need to burden the applicant with costs.

ORDER

23. I therefore issue the following order:

1. The matter is struck off the roll for lack of urgency,
2. No order is to costs.

M MALANGENI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG

APPEARANCES:

Counsel for the Applicant : Adv S Aucamp Instructed by: Govender Patel Dladla Inc. Date Heard : 15 OCTBER 2024 Date of Judgment: 18 OCTOBER 2024

- [1] Case no 2023/080436 delivered by the High Court off South Africa Gauteng division, Johannesburg on the 13/10/23
- [2] (2010) 3 ILJ 112 (LC) also reported at (2009) 10 BLLR 989 (LC)
- [3] 2014 35 ILJ 2479 (LC) At Para [32] (also reported at [2014] 6 BLLR 582 (LC)
- [4] case number: 2024-012775 delivered in Gauteng division, Johannesburg
- [5] 2003
- (2) SA 253 (SCA)

[6] Appearing on page 87 of the indexed bundle.

[7] (279/2020)

(2021) ZASCA 67 (3 June 2021)

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Prepared on 10 October 2026 · Esheria