

SOUTH AFRICA / JUDGMENT

Focus Connection (Pty) Ltd and Another v Eagle Creek Investments 472 (Pty) Ltd and Another (A5007/2018, 5738/2016) [2019] ZAGPJHC 276 (6 August 2019)

[2019] ZAGPJHC 276

COURT

South Gauteng High Court, Johannesburg

BEFORE

Twala M L

CASE / FILE NUMBER

A5007/2018, 5738/2016

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REPUBLIC OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

(1)

REPORTABLE: YES

/ NO

(2)

OF INTEREST TO OTHER

JUDGES: YES/NO

(3)

REVISED.

CASE

NO: 5738/2016

A5007/2018

MAG.

In

the matter between:

FOCUS
CONNECTION (PTY) LTD
(REG.
NO: 1995/08870/07
FIRST APPLICANT
QIN
JIANG
SECOND APPLICANT
AND
EAGLE
CREEK INVESTMENTS 472
(PTY)
LTD
FIRST RESPONDENT
THE
SHERIFF FOR THE PRETORIA
EAST SECOND
RESPONDENT

JUDGMENT

TWALA J

- [1] Before this Court is an application by the applicant wherein he seeks an order interdicting the respondents who are armed with a writ from executing against his property with an ancillary order declaring the writ of execution to be invalid and unlawful. The application comes from the urgent Court where it was strenuously opposed as a result it was struck from the roll for lack of urgency.
- [2] It is necessary to mention at this stage that the second respondent did not file its opposition to the application. Further, although it is undesirable for individual directors to represent a company, I allowed the second applicant to represent both himself and the first applicant for he is the sole director of the first applicant and has full knowledge of what happened in this litigation as he was involved since its inception. I therefore propose to refer to the parties as applicants and respondent.
- [3] The genesis of this application stems from the fact that the respondent obtained judgment against the applicants on the 10th of May 2016 for payment of the sum of R578 301.15 with interest at the rate of 2% per annum calculated from the 1st of March 2016 to date of payment. It is not in dispute that the Supreme Court of Appeal granted the applicants leave to appeal this judgment on the 19th of December 2017. However, the applicant lodged its appeal with the Gauteng Division of the High Court instead of this Division. The respondent approached the Judge President of this division and objected to the launching of the appeal in the Gauteng Division which resulted in the Judge President withdrawing his consent for the appeal to be heard in the Gauteng Division. At that point the applicants had already secured the date of hearing of the appeal as the 1st of March 2020.

[4] The respondent brought an application seeking the applicants to find security for costs and on the 18th of April 2018 security was determined by the Registrar to be the amount of R65 000 which the applicants were to find within 30 days. As at the 1st of June 2018 the applicants had not find security and the appeal record had not been filed as required by the Rules. The applicants,

due to their failure to file the record of the appeal on the 15th of May 2018, the appeal lapsed. The applicants attempted to find security after the 1st of June 2018 as a result the respondent brought an application in terms of Rule 30 which application was ruled in favour of the

respondent on the 19th October 2018. The respondent proceeded to issue a warrant of execution against the property of the applicants.

[5] On the 8th of November 2018 the applicants brought an application for leave to appeal the ruling on the Rule 30 application. On the 7th of May 2019 the sheriff attached the movable property of the applicants. The applicants then brought an urgent application to stay

the execution of the warrant on the 12th of May 2019. On the 21st of May 2019, the sheriff returned a nulla bona on the applicants. The Urgent Court struck off the application for lack of urgency. However, the applicant was convinced that the respondent would now be coming to execute against its home and will have to live in the street with its children – hence it proceeded with this application.

[6] It is a trite principle of our law that, for a judgment creditor to execute against the immovable property of a judgment debtor, it should first bring an application to Court seeking an order to do so. The application needs to be served on the judgment debtor, the applicants in this case, who then has the opportunity to oppose it and or bring to the attention of the Court his personal circumstances to establish why that particular immovable property should not be declared executable.

[7] The applicants contended that the writ itself is unlawful and it was obtained illegally since it was obtained whilst the judgment of the 10th May 2016 and the ruling on the Rule 30 application were being appealed against and the appeal was still pending.

[8] I am unable to disagree with counsel for the respondent that the application to stay the writ has been overtaken by events since the return of the writ is a nulla bona. The application has no merit since there is no writ as things stand. Further, there is a remedy available to the applicants in that they can bring an application to reinstate the appeal against the judgment of the 10th of May 2016 which appeal lapsed on the 15th of May 2018 due to the applicants' failure to file the record. In my view, since the appeal had lapsed on the 15th of May 2018, nothing precluded the respondent, as a judgment creditor, from issuing and executing a writ against the property of

the applicants.

[9] I find myself in disagreement with the applicants in that s18 of the Superior Courts Act, 10 of 2013 finds application in this case. The ruling and or finding on the Rule 30 application is interlocutory in nature and does not have the effect of a final order – hence it is not appealable.

[10] It is therefore my respectful view that there is no merit in this application and the applicants have failed to demonstrate that there is no other remedy available to them other than to interdict the respondent. As I indicated above, the applicants can bring an application to reinstate the appeal against the judgment of the 10th of May 2016. I therefore conclude that the application for falls to be dismissed.

[11] In the circumstances, I make the following order:

The application is dismissed with costs.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 29th July 2019

Date of Judgment: 6th August 2019

For the Applicant: Mr Qin Jiang

For the Respondents: Adv RJ Bouwer

Instructed by: Craig Berg Inc Attorneys

Tel: 021 556 7675

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