

SOUTH AFRICA / JUDGMENT

Klein Dumpie CC and Others v Jaments Entrprise (Pty) Ltd (75134/2016) [2017] ZAGPPHC 336 (2 June 2017) [2017] ZAGPPHC 336

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Westhuizen

CASE / FILE NUMBER

75134/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO.: 75134/2016

DATE:

02/06/2017

In

the matter between:

KLEIN

DUIMPIE

CC FIRST

APPLICANT

GIDEON

JOHANNES JACOBUS BOTHA

SECOND APPLICANT

DUFNEY

BOTHA

THIRD APPLICANT

NELMARIE

BOTHA

FOURTH APPLICANT

SCHONLAND

COLLIERY GROUP (PTY) LTD

FIFTH APPLICANT

GIDEON

GROENEWALD

BOTHA

SIXTH APPLICANT
and
JAMENTS
ENTRPRISE (PTY)
LTD RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, A J

- [1] This matter comes before the urgent motion court for relief pending the institution of proceedings to vary a court order relating to an agreement entered into between the parties. That order was granted on 17 November 2016 by agreement. The applicants propose that the intended proceedings be instituted 20 days after the grant of the relief sought in this application.
- [2] The applicants seek an order suspending the operation of paragraph 1 of the order of 17 November 2016 (the order), pending the institution of the aforesaid variation proceedings and that any writ of execution that is, or has been, issued pursuant to paragraph 1 of the order also be suspended from operation and/or execution.
- [3] The issue of urgency is extremely vague. Counsel for the applicants was constrained to argue that the urgency arose due to the alleged unaccommodating attitude on the part of the respondent. The respondent's attitude complained of relates to the respondent's unwillingness to hold back on the issuing of a writ of execution in respect of paragraph 1 of the order pending the intended variation proceedings. In that regard, the respondent has caused a writ of execution to be issued on or about the date when this application was prepared.
- [4] In terms of the order, the applicants were obliged to make payment on or before the 7th of each following month. In that regard, the applicants were aware of their obligations in terms of paragraph 1 of the order at the latest on 8 April 2017, the day after the April 2017 payment was due. The applicants were acutely aware that the next payment was to be made on or before 7 May 2017. Yet the applicants waited until 4 May 2017 before raising the issue with the respondent. When, according to the applicants, they realised on 10 May 2017 that the respondent would not adhere to their request, the penny dropped and they commenced preparation of this application.
- [5] The applicants were further aware of the grounds for their intended application for variation of the order, at least by 21 March 2017 when they threatened to take steps to commence proceedings in that regard. The applicants disclosed their intention to institute the said proceedings in an answering affidavit in other proceedings instituted by the respondent against the applicants in respect of the same order of 17 November 2016.

Nothing has come thereof, but for the proposal that the applicants institute such proceeding within 20 days of the grant of an order in this application. On the applicants' own version, they were aware of the alleged grounds for a variation of prayer 1 of the order soon after 17 November 2016. No steps are taken in that regard. Steps are only intended to be taken within 20 days of the grant of the order sought in the notice of motion in this application.

- [6] It follows that any urgency that may have arisen was of the applicants' own doing. Such urgency does not warrant the attention of the urgent motion court. However, both parties argued the merits of the application and a determination thereon is required.
- [7] It is common cause that this application is premised upon the provisions of Rule 45A of the Uniform Rules of Court. That rule

provides as follows:

"The court may suspend the execution of any order for such period as it may deem fit."

- [8] The authorities are clear that the court has an unfettered discretion to grant a stay of execution.[1] The only qualification, if it is a qualification, is that real and substantial justice requires a stay of execution. It has

been held that where the underlying causa of the judgment debt is being disputed or no longer exist, a stay of execution will be granted.[2] A further instance where a stay of execution will be ordered is where an attempt is made to use the levying of execution for an ulterior purpose. [3]

- [9] The second instance referred to above is not relevant. It is not the applicants' case that the respondent has an ulterior purpose in executing on the order. Counsel on behalf of the applicants contends that the first instance is applicable. In that regard counsel

submitted that an injustice would follow if the relief in the present matter is not granted.

- [10] Further in that regard, counsel for the applicants relied heavily upon the judgment in *Tony Gois t/a Shakespeare's Pub v Van Zyl et al*[4] where the following is stated:

"[32] Normally this Court will favourably consider the stay of a writ of execution when real and substantial justice requires such a stay or, put differently, where injustice would otherwise result.

- [33] In *Erasmus v Sentraalwes Kooperasie Beperk* [1997] All SA

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- (0) at 307DH it was held that the requirements for an interim interdict could be taken into account in determining whether or not to grant a stay. This test was found not to be entirely appropriate especially where an applicant is not asserting a right but seeks an indulgence on the grounds that execution may result in an injustice. In the *Road Accident Fund v Strydom* 2002 (1) SA 292 (C) at 304EH the court held that:

"....at the heart of the enquiry relative to the exercise of the Court's discretion is whether it has been shown by the applicant that there is a well grounded apprehension of execution of the order taking place at the instance of respondent and of injustice being done to the applicant by way of irreparable harm being caused to applicant if execution is not suspended."

- [34] Furthermore in considering whether or not to exercise its discretion to grant a stay of execution, a court is not required to take the merits of the underlying attack on the causa of the writ into account. In *Strime v Strime* 1983 (4) SA 850 (C) the applicant applied for a stay in execution pending the outcome of a variation of a maintenance order which he had sought. The court there said: "whether or not the applicant is likely to succeed in obtaining a cancellation or variation of the maintenance order is not for this Court to determine. It would also be unwise to express any view because of the pending maintenance court application" (at 852GH).
- [35] The above decision is in line with the finding in *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T), to the effect that a stay of execution will be granted where the underlying causa is the subject matter of an ongoing dispute between the parties. It is therefore sufficient that there is a possibility that the causa underlying the writ may be ultimately removed. The applicant is therefore not required to satisfy this Court as to his prospects of success in the principle dispute.
- [36] An application for a rescission, review or variation of an award obviously qualifies as an attack on the causa underlying the award. Where an application for a rescission or review or variation of an award is pending, there is a possibility that the causa underlying the writ may ultimately be removed.
- [37] The general principle for the granting of a stay in execution may therefore be summarized as follows:
- (a) a court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result;
 - (b) the court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right but attempting to avert injustice;
 - (c) that the court must be satisfied that:
 - (i) the applicant has well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and
 - (ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.
 - (iii) irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed ie where the underlying causa is the subject matter of an ongoing dispute between the parties;

(iv) the court is not concerned with the merits of the underlying dispute the sole enquiry is simply whether the causa is in dispute."

[11] Counsel for the applicants submitted that in the present instance there is an ongoing dispute in respect of the underlying causa. Hence, it was submitted that the applicants would suffer irreparable harm should the writ for execution not be stayed. The applicants' counsel further submitted that the court is not permitted to consider the merits of the alleged ongoing dispute.

[12] In my view, the aforementioned contentions are without substance for what follows.

[13] In the present instance, the underlying causa in respect of the lis between the parties that led to the granting of the order on 17 November 2017 became settled. The parties contractually bound themselves in a written agreement in that regard. By consent between the parties that contract was made an order of court. That agreement ended the lis between the parties.

[14] Subsequent to the conclusion of the agreement that was made an order of court on 17 November 2016, the applicants aver that they became aware of an alleged error in the calculation of the amount owed to the respondent. The applicants

filed, in an application by the respondent in respect of the order of 17 November 2016, an affidavit on 21 March 2017 in which they stated that they had agreed to the order in error with reference to the amount due to the respondent. The applicants aver that the proposed application for variation would correct the alleged error, and hence that only an amount of R125 152.25 is now due to the respondent. From the applicants' aforementioned affidavit, it is apparent that the alleged error was on the part of the applicants. The applicants contend that the tranches of payment, as recorded in the agreement, have been incorrectly recorded. It is for that reason that the applicants intend to institute proceedings for the variation of prayer 1 of the order of 17 November 2016.

[15] In my view, the aforesaid situation does not constitute an ongoing dispute of the underlying causa of the order of 17 November 2017 as proposed in Tony Gois, *supra*. It is clearly a new dispute, one that appears to be unilaterally devised.

[16] Despite the alleged error that was discovered shortly after the grant of the order, the applicants continued to make payment, albeit late payment, in accordance with the provisions of prayer 1 of the order. It is common cause that the respondent was compelled to issue various writs for execution before the required payments were made.

[17] Furthermore, it is clear from Tony Gois, *supra*, that there is a prerequisite that proceedings for a rescission, or review, or variation are pending. On the applicants' own version, there are no such proceedings pending. Such proceedings are only intended once there has been a stay of any writ for execution issued past or present.

- [18] It follows that the applicants cannot avail themselves of the principles enunciated in Tony Gois, *supra*. Those principles clearly do not apply in the present matter. No injustice will result should this application not succeed.
- [19] Furthermore, there is no merit in the contention submitted on the applicants' behalf that they would suffer irreparable harm should the order staying any issued writ, or writ to be issued, not be granted. Counsel for the respondent submitted that the applicants would have substantial redress should they be vindicated in any proceeding for a variation of the order. They would clearly be entitled to repayment for any amount overpaid. I agree with that submission.
- [20] Counsel for the applicants further submitted that the applicants would be prevented from conducting their business and would possibly face liquidation should the present application not succeed. No facts supporting the contention in respect of a possible liquidation were raised in the founding papers. There is no merit in that submission. The applicants have not stated that they are not in a financial position to adhere to the remaining tranches of payment should the order not be granted.
- [21] It follows that no injustice will result should this application not succeed. The balance of convenience clearly sways in favour of the respondent.
- [22] For all of the foregoing, the application cannot succeed.

I grant the following order.

- (a) The application is dismissed;
- (b) The applicants are to pay the costs, the one paying the other to be absolved.

C J VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant: C P Wesley

Instructed by:

Friedland Hart Solomon & Nicolson

On behalf of Respondent: G R Egan

Instructed by:

Chris Greyvenstein Attorneys.

[1] Whitfield v Van Aarde 1993(1) SA 332 (E)

[2] Le Roux v Yskor Landgoed (Edms) Bpk 1984(4) SA 252 (T)

[3] Brummer v Gorfil Brothers Investments (Pty) Ltd 1999(3) SA 389 (SCA) at 418E-

[4]

[2003] JOL 11875 (LC) at [33] - [35]

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