

SOUTH AFRICA / JUDGMENT

Louw v Wesbank a division of Firststrand Bank Ltd (905/2018) [2019] ZANCHC 12 (22 March 2019) [2019] ZANCHC 12

COURT

Northern Cape High Court, Kimberley

BEFORE

BM Pakati

CASE / FILE NUMBER

905/2018

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IN

THE HIGH COURT OF SOUTH AFRICA
(NORTHERN
CAPE DIVISION, KIMBERLEY)

Case No: 905/2018

Heard on: 28/02/2019

Delivered on:

22/03/2019

In

the matter between

GETRUDE

LOUW

Applicant

And

WESBANK,

a division FIRSTRAND BANK LTD

Respondent

JUDGMENT

ON APPLICATION FOR LEAVE TO APPEAL

PAKATI J

[1] The applicant, Ms Getrude Louw, applies for leave to appeal the order I granted on 19 November 2018. She filed her notice dated 29 November 2018 on 30 November 2018. The respondent, Wesbank, a division of Firststrand Bank Ltd, opposes the application. On 19 November 2018 I made the following order:

‘1. The main application is dismissed.

2. The applicant, Ms Louw, is ordered to forthwith deliver into the possession of the Sheriff of this Division a 2016 Volkswagen Golf VII 2.0 TSI R DSG with engine number WVWZZZAUZGW284785 and a 2018 Ford Ranger 2.2 TDCI XL A/T P/U D/C with engine number QJ2LPHC22366, who shall deliver them to the respondent, Wesbank, a division of Firststrand Bank Limited, who shall in turn, at its own expense:

2.1 Transport the vehicles to garaged premises situate at Day and Knight Towing, 3 Cecil Sussman Street, Kimberley;

2.2 Retain the vehicles at such garaged premises under security, pending the outcome of the action under Case Number 1046/2018 instituted by the respondent, Wesbank, against the applicant, Ms Louw, in this Court.

3. The respondent shall not use the vehicles or permit that they be used.

4. In the event that the applicant fails to comply with the order above within five days of service of this order on the applicant’s attorneys of record, the Sheriff is authorised and directed to take the vehicles into his possession from whomever and wherever he may find them and return them to the respondent as aforesaid.

5. The applicant is ordered to pay the costs of this application on a scale as between party and party.’

[2] In her notice the applicant recorded the following grounds summarised thus:

2.1 That I erred in finding on the facts contained in the summons which, according to her, clearly show that a dispute of fact surrounding the validity and enforceability of the credit agreement exists. She referred to paragraphs 10, 11, 12 and 13 of my judgment;

2.2 That I erred in finding that it could be perceived that Maweale Construction (Pty) Ltd was used as a front employer to induce the bank to approve her application for finance;

2.3 That I erred by failing to give cognisance to the fact that the insurance premiums for the vehicles was paid monthly thereby

ruling

out the risk of irreparable harm to them;

2.4 That I erred in basing my finding on the completed application forms for finance as that is in dispute and can only be clarified by Mr Strydom's evidence during the trial; and

2.5 That I erred in basing my judgment on facts not proven yet by the action proceedings thereby granting the counter-application in favour of the respondent.

[3] The fact that the applicant paid the insurance premiums of the motor vehicles is neither here nor there. The motor vehicles remain the bank's property until the final instalment has been paid in full. In my judgment I found that the applicant failed to satisfy the requirements for the relief sought. I also found that the balance of convenience favoured the bank. I re-iterate what I said in my judgment that the function and purpose of an interim attachment order is to protect the leased goods against deterioration and damage and to keep them in safekeeping until the case between the parties has been finalised. Its purpose is not to enforce remedies or obligations under the credit agreement, and the remedy does not form part and parcel of the debt enforcement process envisaged in the National Credit Act, 34 of 2005.[1] In *VAN RHYN v REEF DEVELOPMENTS A (PTY) LTD*[2] Margo J held that if the claim by an applicant for an interdict pendente lite is vindictory and if in the circumstances he is entitled to an interim interdict restraining the use of the thing by the respondent,

then there is no reason why a further order should not be granted authorising attachment pendente lite to give effect to the restraint against use and to protect the thing from deterioration.

[4] On 04 December 2018 the applicant brought an application for the stay of the enforcement of my judgment handed down on 19 November 2018 on urgent basis in terms of section 18 (1) of the Superior Courts Act, 10 of 2013[3]. This application was dismissed by Coetzee AJ the same day. The applicant allowed the Sheriff to remove the motor vehicles to a safe storage. She did not appeal the decision dismissing her application for stay of execution. In *SOUTH AFRICAN REVENUE SERVICE v COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION AND OTHERS*[4] Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J concurring)

held:

'[26] Peremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self-resignation to the unfavourable order that could otherwise be appealed against. Dabner articulates principles that govern peremption very well in these terms:

‘The rule with regard to peremption is well settled, and has been enunciated on several occasions by this court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it.’

The onus to establish peremption would be discharged only when the conduct or communication relied on does ‘point indubitably and necessarily to the conclusion’ that there has been an abandonment of the right to appeal and resignation to the unfavourable judgment or order.’

[5] Rogers AJA in *CIPLA AGRIMED (PTY) LTD v MERCK SHARP DOHME CORPORATION AND OTHERS*[5] stated:

‘[19] An interim interdict pending the determination of an action is not final in effect, which is why matters decided for purposes of granting interim interdicts do not become *res judicata*. The grant of an interim interdict is thus not usually appealable.’

[6] Leach JA (Navsa JA, Cachalia JA, Tshiqi JA and Willis JA concurring) in *LAGOON BEACH HOTEL (PTY) LTD v LEHANE NO AND OTHERS*[6] held:

‘[33] In the light of these considerations I see no reason to interfere with the court a quo’s recognition of Mr Lehane. It had the discretion to exercise whether or not to do so, and in my view such discretion was properly exercised. It also properly exercised its discretion to grant an interim interdict to preserve assets in respect of which Lehane had established a *prima facie* right. In broad terms, then the appeal must fail.’

[7] It begs a question whether granting an interim interdict is final in effect and therefore appealable. Harms DP answered this question in *NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v KING*[7] thus:

‘[46] It is, however, necessary to emphasise that the fact that an “interlocutory” order is appealable does not mean that leave to appeal ought to be granted because if the judgment or order sought to be appealed against does not dispose of all the issues between the parties the balance of convenience must, in addition to the prospects of success, favour a piecemeal consideration of the case before leave is granted. The test is then whether the appeal, if leave were given, would lead to a just and reasonable prompt resolution of the real issue between the parties. Once leave has been granted in relation to a “judgment or order” the issue of convenience cannot be visited because it is not a requirement for leave, only a practical consideration that a court should take into account.’

[8] I re-iterate what I said in paragraph [20] of my judgment that the declaratory order sought by the applicant was final in nature and therefore the principle in *PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD*[8] was applicable.

- [9] None of the findings I made in my judgment of 19 November 2018 is binding in a later trial.
- [9] In the instant case the interim interdict is also not final in nature and therefore not appealable. The judgment or order sought to be appealed against does not dispose of the issues between the parties. It is not in the interest of justice to deal with this matter piecemeal. In my view, there are no prospects of success. No other court may arrive at a different decision. The application must therefore fail.

ORDER

The application for leave to appeal is dismissed with costs.

BM PAKATI

JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

For the applicant: ADV E KAMMIES

Instructed by: MZUZU ATTORNEYS

For the Respondent: ADV WG PRETORIUS

Instructed by: DUNCAN & ROTHMAN

- [1] See SA Taxi Securitisation (Pty) LTD v Chesane 2010 (6) SA 557 (GSJ) at para [10]; See also Wesbank, a division of Firststrand v Krorosi Samuel Magaladi: Case No. 62969/2013 delivered on 13 February 2018 at para [6] where Khumalo J held: ‘The function and purpose of an interim attachment order is to protect the leased or partially paid for goods against deterioration and damage and to keep them in safekeeping until the case between the parties has been finalised.
- [2] 1973 (1) SA 488 (W)
- [3] Section 18 (1) provides: ‘(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal, is suspended pending the decision of the application or appeal.
- [4] 2017 (1) SA 549 (CC) at para [26]
- [5] 2018 (6) SA 440 (SCA) at para [19]; See also African Wanderers Football Club (Pty) Ltd v Wanderers Football Club 1977 (2) SA 38 (A) at page 38; Phillips and Others v National Director of Public Prosecutions 2003 (6) SA 447 at paras [17] & [20] and Cronshaw and Another v Fidelity Guards Holdings Pty Ltd [1996] ZASCA 38; 1996 (3) SA 686 (A) at 691A
- [6] 2016 (3) SA 143 (SCA) at para [33]
- [7]
- [2010] (3) All SA 304 (SCA) 304 at para [46]

[8]

[1984] ZASCA 51; 1984 (3) SA 623 (a) AT 634H-I

[9] Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another 2014 (5) SA 297 (SCA)

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