

SOUTH AFRICA / JUDGMENT

Main Street 1613 (RF) and Others v Solar Capital Orange (RF) Proprietary Limited and Others (56709/2021) [2023] ZAGPJHC 109 (25 January 2023) [2023] ZAGPJHC 109

COURT

South Gauteng High Court, Johannesburg

BEFORE

ML Senyatsi

CASE / FILE NUMBER

56709/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 56709/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 25 JANUARY 2023

In the matter between:

MAIN STREET 1613 (RF) First Applicant

THE STANDARD BANK OF

SOUTH AFRICA LIMITED Second

Applicant

THE DEVELOPMENT BANK OF

SOUTHERN AFRICA LTD Third

Applicant

And

SOLAR CAPITAL ORANGE

(RF) PROPRIETARY LIMITED First

Respondent

PHELAN, PASCHAL Second

Respondent

TENYANE, JOSEPH MOSEDI Third

Respondent

JANSE VAN RENSBURG

JACQUES Fourth

Respondent

Delivered: By transmission to the parties via email and uploading onto Case Lines The reasons are deemed to be delivered. The date for hand-down is deemed to be 25 January 2023.

REASONS

SENYATSI J:

[1] On 8 March 2020 I granted Part A of the order in an application for execution of a judgment in perfection of the General Notarial Covering Bond Numbers 26793/2018 registered with the Registrar of Deeds, Cape Town and General Notarial Covering Bond No 1401/2018 registered with the Registrar of Deeds, Kimberly. The execution of the order was pending leave to appeal in terms of section 18 of the Superior Courts Act, No: 10 of 2013 ("The Act").

[2] The order was to the following effect:

2.1. The application is enrolled as an urgent application and insofar as may be necessary, the forms, time period and service provided for by the Rules of this Court are dispensed with and this application is heard as one of urgency under Rule 6(12) of the Uniform Rules of Court;

2.2. The first respondent's ("SCO's") application for leave to appeal the whole court order handed down by Windell J on 7 February 2022 ("7 February Order") does not suspend the operation and execution of the 7 February Order;

2.3. SCO is in breach of the 7 February Order;

2.4. SCO is ordered to cease acting in contravention of the 7 February Order immediately;

2.5. SCO is ordered forthwith to:

2.5.1. allow the first applicant, without any hindrance or obstruction whatsoever, acting through its duly authorised representative (as the case may be), or with the assistance of the Sheriff of this Court or his/her Deputy with the appropriate jurisdiction, for the purposes of perfecting, effecting and protecting its security in terms of the general notarial bond, which was registered with the Registrar of Deeds Cape Town on 29 November 2018 under Bond No. 26793/2018 and with the Registrar of Deeds Kimberley on 29 November 2018 under Bond No. 1401/2018, to enter into and secure and take possession of:

2.5.1.1. the Project Site at Farm Narosies no 228, Hantam Municipality, Calvinia in the Northern Cape; and

2.5.2. SCO's head office at 47 Main Road, Green Point, Cape Town 8001; or wherever the described property and effects may be found and there to attach, take control of and secure all of SCO's movable property and effects (of whatever description) without exception, including, but not limited to:

2.5.2.1. all the plant, equipment, machinery, office furniture, fixtures and fittings, stock-in-trade and motor vehicles of SCO, nothing excepted;

2.5.2.2. every claim and indebtedness of whatever kind or nature owing to SCO;

2.5.2.3. all the rights of SCO to quotas, permits, licences and the like;

2.5.2.4. all the contractual rights of SCO of whatsoever nature including without limitation, rights in respect of insurance policies taken out by or in favour of SCO, franchise rights and rights under agency agreements or other agreements of a like nature and rights as lessee or lessor;

2.5.2.5. all the goodwill of the business of SCO and all its rights to trademarks and trade names;

2.6. allow the first applicant acting through its duly authorised representative (as the case may be), or assisted by the Sheriff or his/her Deputy, without any hindrance or obstruction whatsoever, to attach, take control of and secure all of SCO's movable property and effects found to exist as described above, to the value of R70,814,199.39, together with interest in terms of the provisions of the relevant agreements (being the Senior Facility Agreement, the 2002 ISDA Master Agreement and the Common Terms Agreement), in one or more of the following ways, without removing same from the Project Site and Cape Town office:

2.6.1. compiling an inventory of the assets referred to above;

2.6.2. where applicable, affixing to such assets a mark and/or sticker identifying same as being an asset subject to this Order;

2.6.3. serving upon the Plant General Manager and the Site Security Provider, a copy of this Order; and

2.6.4. taking photographs of all assets attached as aforesaid.

2.7. allow the applicants or their agents, without any hindrance or obstruction whatsoever, to conduct an asset inspection to confirm and verify the details and descriptions of the assets (which assets are owned by SCO, and which are not subject to any reservation of ownership by any other party) and to appoint a third-party valuer who will value the assets which are subject to the special notarial bond;

2.8. allow the applicants, or any of their duly authorised agents or representatives (including any Technical Adviser which the applicants may appoint) unfettered access, without obstruction, at all times, and without any notice to SCO to:

2.8.1. the Project Site for the purposes of inspecting the Project itself, the Project Facilities and any and all records of the Project (including all drawings and specifications) and any movable property and effects on the Project Site, and confirming their continued existence on the Project Site;

2.8.2. the Cape Town Office for the purposes of inspecting any movable property and effects at the Cape Town Office, and confirming their continued existence at the Cape Town Office;

2.8.3. SCO is ordered to pay the costs of this application on an attorney and own client basis.

[3] The controversy in this application was whether the 7 February Order could be executed pending the application for leave to appeal. The answer provided by this court was an emphatic “YES”.

[4] The reasons for the order are as set below. The power of the court to permit the execution of a judgment pending the appeal the application for leave to appeal is regulated by section 18 (3) of the Superior Courts Act No 10 of 2013 (“the Act”) which states as follows:

“(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on the balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so order.”

[5] This section has been a subject of significant attention by our courts with regards to the requirements to be met.

[6] In *Ntlemeza v Helen Suzman Foundation*[1] it was held as follows:

“[32] There can be no doubt that an application by HSF and FUL for leave to execute, had there been one earlier, could have been brought and would have been competent after the application for leave to appeal was filed in this court. Court must be guardians of their own process and be slow to avoid a to-ing and fro-ing of litigants.[2]

[7] In *Incubeta Holdings & Another v Ellis and Another*[3], the court said the following about section 18:

“It seems to me that there is indeed a new dimension introduced to the test by the provisions of s18. The test is twofold. The requirements are:

First, whether or not ‘exceptional circumstances’ exist; and

Second, proof on the balance of probabilities by the applicant of

The presence of irreparable harm to the applicant/victim, who wants to put into operation and execute the order; and

The absence of irreparable harm to the respondent/loser, who seeks leave to appeal.”

[8] As to what would constitute exceptional circumstances, the court in *Incubeta*[4], looked for guidance to an earlier decision on Admiralty law, namely, *MV Ais Mamas Seatrans Maritime v Owners MV Ais Mamas & Another*[5], where it was recognised that it was not possible to lay down precise rules as to what circumstances are to be regarded as exceptional and that each case has to be decided on its own facts.

[9] In *UFS v Afriforum and Another*[6] it was held by court that it was immediately discernible from sections 18(1) and (3) that the Legislature proceeded from the well-established premise of the common law, that the granting of relief of this nature constituted an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. It noted that the exceptionality is further underscored by

the requirements of section 18(4)(i).[7]

[10] The 7 February Order is interlocutory in nature as only Part A thereof was granted pending the determination of Part B. The exceptional circumstances that were found were that preparing an inventory of the assets to give effect to the General Notarial Bond was essential to ensure that no harm was occasioned to the applicant in that application the event of winding up of the respondent. I say so because if that were to happen, the two general notarial covering bonds registered as security to cover the R70 million rand facility will not be worth the paper it is written on. This is because the claim by the applicants in so far as movables are concerned will become concurrent and not secured. The 7 February Order is evidence that the construction of the solar power project should not be interfered with by the perfection.

[11] Furthermore, the respondent will not suffer any harm because the recording of the inventory to give effect to the general notarial bond without removing any asset will not adversely affect the respondents.

[12] Accordingly, I stand by the order I granted.

ML SENYATSI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

DATE OF APPLICATION: 08 March 2022

DATE REASONS DELIVERED: 25 January 2023

APPEARANCES

Counsel for the Applicant: Adv A Botha SC

Instructed by: Webberwentzel

Counsel for the

Respondents: Adv

CHJ Badenhorst SC

Adv A Vorster

Instructed by: Andersen

Attorneys

[1] 2017

(5) SA 402 (SCA) at para 32

[2] See *Copthall Stores Ltd v Willoughby's Consolidated Co Ltd* (1) 1913 AD 305 at 308; See also *Fismer v Thornton* 1929 AD 17 at 19

[3] 2014

(3) SA 189 (GJ) para 16

[4] Supra para [7]

[5] 2002

(6) SA 150 (C)

[6] [2016] ZASCA 165 (17 November 2016)

[7] Section 4 (i) provides that: "If a court orders otherwise, as contemplated in subsection (1) – (i)the court must immediately record its reasons for doing so."

[7] Section 4 (i) provides that:

"If a court orders otherwise, as contemplated in subsection (1) –

(i)the court must immediately record its reasons for doing so."

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