

SOUTH AFRICA / JUDGMENT

Nkola v Argent Steel Group (Pty) Ltd t/a Phoenix Steel (CA69/2015) [2016] ZAECGHC 115 (20 October 2016) [2016] ZAECGHC 115

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M L Beard, N G Beshe, M J Lowe

CASE / FILE NUMBER

CA69/2015

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IN THE

HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. CA 69/2015

Date

heard: 17 October 2016

Date

delivered: 20 October 2016

NOT

REPORTABLE

In the

matter between:

BONGILE

SAMUEL

NKOLA

Appellant

and

ARGENT

STEEL GROUP (PTY) LTD

t/a

PHOENIX

STEEL

Respondent

JUDGMENT

Beard AJ :

- [1] This is an appeal against the order of Madam Justice Jacobs (AJ) dated 27 November 2014 in which the learned judge granted an order declaring the Appellant's immovable properties, of which there are two, executable, together with an order that the appellant pay the costs of the application on the attorney and client scale. The appeal is with the leave of the court a quo.
- [2] At the outset, Mr Renaud, who appeared for the appellant, moved an application for condonation for the late filing of the notice of appeal, the notice of prosecution of the appeal, the record of appeal and the appellant's heads of argument. The respondent also filed an application for condonation in which it sought condonation for the late filing of the respondent's heads of argument. After hearing argument on the condonation applications, we ordered that condonation be granted and indicated that the reasons for our order would follow. These are those reasons.
- [3] The court's power to grant relief in condonation applications is not to be exercised arbitrarily and upon the mere asking, but with judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. The grant or otherwise of condonation is, essentially, a matter of fairness to both sides based upon a consideration of the facts (see *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C). Whilst they do not constitute a *numerus classus*, the factors usually relevant include :

"...the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated : they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation."

Regarding the approach to be adopted to the consideration of these interrelated factors, the following has been held :

"Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality should not be overlooked."

(See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C – F)

- [4] To this list may be added the additional factors of "...the convenience of the court and the avoidance of unnecessary delay in the administration of justice" (see *Byron v Duke Inc* 2002 (5) SA 483 (SCA) at 487J).

[5] Briefly, the background facts giving rise to the application for condonation are as follows :

[5.1] Leave to appeal was granted by the court a quo on 18 December 2015, but the order was only issued by the Registrar on 4 January

2016. The notice of appeal was served on the respondent on 22 January 2016, and filed with the Registrar of the East London Local Circuit Division of the High Court on 25 January 2016, some four days late. This is attributed by the appellant's attorney of record to the intervening holiday period, which affected the availability of counsel.

[5.2] The notice of prosecution of appeal, together with copies of the record and the special power of attorney, were delivered 77 days out of time. This was due to the difficulties experienced by the appellant's attorney in obtaining the record. Initially, it could not be found in the offices of the Registrar of the East London Local Circuit Division of the High Court. It was then located and sent to the Registrar of this Court. Upon making enquiries of the Registrar of this Court as to the whereabouts of the record, the appellant's attorney was informed that it had been received but could not be located. This was due to an "ongoing and large scale re-organisation ... underway in the Registrar's office with the introduction of a new filing system for all its Court files (both past and present), with the installation of new large metal sliding shelves throughout the Registrar's filing rooms." This resulted in the removal of all of the files from the Registrar's filing rooms and their storage, inter alia, in offices, stairwells and passageways throughout the court building. The record of this matter ended up being misplaced in this chaotic state of affairs. Needless to say, it proved extremely difficult to locate and, notwithstanding the assistance of the officials in the Registrar's office, was only located during the first week of August 2016.

[5.3] The record of appeal was then collated, copied and delivered on 15 August 2016.

[5.4] The appeal itself was set down on short notice by the Registrar of this Court. The appellant acceded to the short notice and heads of argument were filed on 3 October 2016, some five days late, owing to counsel's difficulties in preparing same, occasioned by the #feesmustfall campaign (counsel for the appellant lectures at Rhodes University).

[6] In my view, the majority of the delay was occasioned by circumstances beyond the appellant's control, or that of his legal representatives. The overhaul of the filing system at the Registrar's offices was the cause of the greatest portion of the delay. I am thus satisfied that the appellant has provided this court with sufficient explanation for the delay and has thus demonstrated sufficient cause for condonation to be granted. Further, not to grant condonation would be to unduly delay the administration of justice in this matter.

[7] Having granted the appellant condonation, it would be patently unfair not to grant the respondent the same indulgence. For these reasons, condonation was granted as set out above.

[8] That being the case, there is only one issue outstanding; namely the issue of the costs of the application for condonation. I am of the view that the costs of both the appellant and respondent's condonation applications should be costs in the appeal. In this respect, both

parties sought an order that the costs of their respective condonation applications be borne by the other party, in the event of opposition thereto. My conclusion is not altered by the fact that the Respondent opposed the appellant's condonation application. The majority of the delay can be attributed to one of the vagaries of litigation, with the result, in my view, that the successful party should not be deprived of the costs incurred in respect of the condonation applications.

- [9] I turn then to the merits of the appeal. As I have noted above, the appeal is directed against the order of Madam Jacobs (AJ) declaring the appellant's immovable properties executable. The respondent raised a point in limine, based upon the provisions of Rule 49 (4) of the Uniform Rules of Court. The complaint was that the notice of appeal did not specify whether the whole or part of the judgment or order was appealed against.
- [10] In this regard, where it is quite clear from the notice of appeal that the whole of the judgment of the court a quo is appealed against, the court of appeal will accept a notice that fails to specify this in terms. See, in this regard, *Harvey v Brown* 1964 (3) SA 381 (E) at 383A – B. This is particularly the case where a single indivisible order has been made by the court a quo. That is the case here – only one order was made by the court a quo and it is clear that it is this order, and thus the whole of the judgment of the court a quo (constituting, as it does, the reasons for the granting of the order) that is appealed against. There is thus no merit in this point in limine.
- [11] In order to properly contextualise this appeal, it is necessary to summarise the facts and events that led to this point. The respondent obtained judgment against the appellant, based upon a deed of suretyship he signed on 22 February 2008 and in which he bound himself as surety and co-principal debtor with School Furniture & Timber Products (Pty) Ltd. School Furniture & Timber Products (Pty) Ltd ultimately failed to honour its obligations to the respondent and the respondent instituted action against the appellant, as surety, in which it claimed the amount of R2 851 504.91. A deed of settlement was entered into between the parties, in terms of which the appellant was to pay to the respondent R200 000.00 per month until the debt was fully paid. This deed of settlement was made an order of court. The appellant then defaulted on his payments in terms of the deed of settlement.
- [12] As a consequence of this, on 14 July 2011 the respondent obtained default judgment against the appellant for the amount outstanding, a sum of R914 712.12 together with costs on the attorney and client scale. The appellant then applied for rescission of the default judgment granted against him, which application for rescission was dismissed on 6 September 2012. The appellant launched an application for leave to appeal that decision, which application was similarly dismissed.
- [13] The respondent then proceeded to issue a warrant of execution emanating from the default judgment it obtained against the appellant. This was served at the premises of School Furniture & Timber Products (Pty) Ltd on 22 November 2012, the address at which the respondent believed certain movable assets in respect of which a notarial bond had been

passed in its favour, could be located. This bond had been perfected by court order dated 28 August 2008. However, a return of non-service was rendered, as the premises were found to have been vandalised. The appellant states that these premises had been gutted in a fire.

- [14] The respondent then re-issued the warrant of execution and had it served at the premises of FMMC Holdings (Pty) Ltd, a company wholly owned by the appellant and which was also involved in the manufacture of school furniture. The respondent believed that the assets covered by the notarial bond were being utilised by FMMC Holdings (Pty) Ltd at its premises. This warrant of execution was served during May 2013. It is at this point that the appellant and respondent's versions diverge. The respondent stated that the sheriff was only able to attach a motor vehicle outside the premises of FMMC Holdings (Pty) Ltd, as the employees of FMMC Holdings (Pty) Ltd refused the sheriff entry to the premises. The appellant denies this was the case and states that the sheriff was not denied entry to the premises, because that he never sought entry to the premises. The respondent states that the sheriff was instructed to, and did, return to the premises of FMMC Holdings (Pty) Ltd to make a further attempt but that he was again denied entry. This is once again denied by the appellant. Be that as it may, the sheriff returned on 9 September 2013 and was permitted to enter the

premises. He then proceeded to attach certain items found in the premises of FMMC Holdings (Pty) Ltd.

- [15] Whatever occurred on the first two occasions the sheriff sought to enter the premises of FMMC Holdings (Pty) Ltd, it is common cause that the respondent thereafter received an affidavit deposed to by the manager of FMMC Holdings (Pty) Ltd, in which he claimed that the moveable property attached by the sheriff belonged to FMMC Holdings (Pty) Ltd and requested that the sheriff institute interpleader proceedings.
- [16] The respondent's attorneys then caused a further warrant of execution to be served by the sheriff at the appellant's residence in East London on 9 October 2013. The sheriff, on this date, proceeded to attach various items of furniture and household effects in the presence of the appellant. On that date, the sheriff was handed an affidavit deposed to by the appellant's

wife on 27 September 2013 in which she stated that she and appellant are married out of community of property, and that the items attached by the sheriff belong to her. This affidavit, as is clear, was prepared in advance of the sheriff attending the appellant's residence.

- [17] Thereafter, the respondent, frustrated with the fact that it had not been able to satisfy its judgment debt, launched an application dated 17 January 2014, in which it sought an order declaring the appellant's properties executable. It is this application that forms the subject-matter of the present appeal.

[18] The application prompted a response from the appellant and the parties entered into a settlement agreement dated 9 May 2014. This settlement agreement bears the same case number as that of the respondent's application and it is evident that it was entered into in settlement of the application. It provides that :

[18.1] the respondent's application be postponed sine die;

[18.2] the appellant will pay to the respondent the sum of R100 000.00 per month in respect of the respondent's claim; and

[18.3] "in the event of any one instalment not being paid on or before due date, then and in such event, the full amount of capital and interest as well as legal costs shall immediately become due, owing and payable and the [respondent] shall be entitled summarily to proceed with execution as referred to in paragraph 3 supra." [1]

[19] This settlement agreement was, on 13 May 2014, made an order of court and the respondent's application was postponed sine die. The appellant failed to make a single payment in terms of the settlement agreement. Instead the appellant deposed to an answering

affidavit in opposition to the relief sought by the respondent. In it he sought to assert that the respondent was not entitled to an order declaring his immovable property executable as it had not sought to execute against his moveable property, namely shares in certain companies of which he is sole shareholder and director, these shares being of sufficient value to satisfy the judgment debt.

[20] Mr Renaud, for the appellant sought to persuade us that the issue in this appeal is whether or not the respondent is required to execute against the appellant's moveable property prior to seeking an order declaring his immovable property executable. He based his argument upon the ratio in *Nedbank Ltd v Molebaloa*, an unreported decision of the Pretoria High Court, dated 13 September 2016 (case number 37780/2015) and that of *Neveling v Reichmans (Pty) Ltd*, an unreported decision of the Pietermaritzburg High Court dated 5 August 2014 (case number 14070/2013). In those matters the courts held that the word "or" appearing at the end of Rule 46 (1)(a)(i) of the Uniform Rules of Court is now in practice read and interpreted as "and". This has had the effect, so Mr Renaud submitted, of narrowing the court's discretion to declare immovable property executable in circumstances in which there is no Sheriff's return indicating insufficient or no moveable property or where there has been no attempt made to execute against a debtor's moveable property.

[21] I disagree with the approach adopted by appellant's counsel. In my view the appellant, on 9 May 2014, in settlement of the application in which an order declaring his immovable property executable was sought, undertook to make payment of the judgment debt in instalments and agreed that, should he fail to make payment of these instalments, the respondent was entitled, without further notice to him, to execute. Plainly this could only contemplate execution against the appellant's immovable property, as this was precisely the

relief sought in the application. The appellant thus, by agreement, forfeited his right to claim that

the respondent should have sought to execute against his moveable incorporeal property first.

[22] In the event that I am incorrect in this, there is a further point against the appellant's contention. The return of service in respect of the warrant of execution served upon the appellant on 9 October 2013 makes it clear that the sheriff demanded payment of the judgment debt and costs from the appellant. In light of his failure to satisfy the judgment debt and costs, the items listed were attached. As I have noted above, the sheriff was then informed by the appellant that the property attached belonged to his wife. From this it is evident that the appellant failed to mention that he owns other moveable property (in the form of shares)

of sufficient value to satisfy the judgment debt, when requested to do so. The appellant was the person best placed to know of the existence of his moveable property (albeit incorporeal moveable property) of sufficient value to satisfy the judgment debt and costs. He was required, by the provisions of Rule 46 (3), when it was demanded of him to point out moveable property of sufficient value to satisfy the judgment debt and costs, to mention this property. His failure to do so cannot now provide him with a valid defence to the respondent's application to have his immovable properties declared executable.

[23] Appellant's counsel also submitted that it was clear, from an email sent by one of the respondent's officials that the respondent was pursuing the appellant in order to humiliate him and have him and his family cast out into the streets. This submission is, in my view, unsupportable. Whilst the respondent is clearly (and understandably) frustrated, there has been no abuse of the process and procedures of this Court. In order for such a submission to be supportable, such an abuse would, of necessity, have

to be present. As it is not, it is clear that the respondent's ultimate goal is not the humiliation of the appellant, but rather the satisfaction of its judgment debt.

[24] Accordingly, I am of the view that the court a quo did not err in granting the order it did, albeit that I come to the same conclusion for different reasons. In the result, I propose to make the following order :

1. The appeal is dismissed with costs, such costs to include the costs associated with the condonation applications.

M L BEARD

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

N G BESHE

JUDGE OF THE HIGH COURT

I agree.

M J LOWE

Appearing on behalf of Appellant: Mr Renaud

Instructed by: Mathew Moodley & Associates

Appearing on behalf of Respondent: Mr Poswa

Instructed by: Abdo & Abdo Attorneys

[1] Paragraph 3 merely contains the clause relating to repayment of the judgment debt.

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Prepared on 10 October 2026 · Esheria