

SOUTH AFRICA / JUDGMENT

Provincial Government: North West and Another v Tsoga Developers CC and Others (M 115/15) [2015] ZANWHC 36 (4 June 2015)

[2015] ZANWHC 36

COURT

North West High Court, Mafikeng

BEFORE

DJAJE

CASE / FILE NUMBER

M 115/15

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

CASE NO: M 115/15

DATE: 04 JUNE 2015

In the matter between:

PROVINCIAL GOVERNMENT:.....1ST APPLICANT

NORTH WEST PROVINCE

THE DIRECTOR GENERAL:.....2ND APPLICANT

OFFICE OF THE PREMIER

And

TSOGA DEVELOPERS CC.....1st RESPONDENT

WANDISILE BOZWANA.....2ND RESPONDENT

THE SHERIFF OF THE HIGH COURT:.....3RD RESPONDENT

HEAD OF DEPARTMENT,

NORTH WEST DEPARTMENT OF

PUBLIC WORKS.....4 RESPONDENT

NORTH WEST DEPARTMENT OF HEALTH.....5 RESPONDENT

NORTH WEST DEPARTMENT OF FINANCE.....6 RESPONDENT

REASONS

FOR JUDGMENT

D J A J E A J

Introduction

[1] This matter was argued before me on 4 May 2015 and after submissions on behalf of the Applicants and the first and second Respondents, I made an order in the following terms:

1, Application for interim interdict in terms of Part A of the Notice of Motion is dismissed,

2. The Applicants are ordered to pay the costs of this application which costs shall include the costs consequent upon the employment of two counsel on Attorney and client scale.

[2] On 12 May 2015 I received the request for reasons by the Applicants and here follows the reasons for the above order.

[3] The Applicants brought an application consisting of Part A and B but only Part A was before me. Part A was an urgent application for an interim relief in terms of which the applicants inter alia sought the suspension of two writs of execution obtained in favour of the first Respondent. The first writ was issued in September 2014 and was concerning the attachment of 44 vehicles and the second one was issued in March 2015 for the attachment of a bank account registered in the name of the Department of Public Works and Transport, North West Provincial Government. Furthermore the Applicants sought the suspension of the enforcement of the order by consent obtained in favour of the first Respondent on 16 May 2013,

[4] Part B of the notice of motion was for the review in terms of section 16 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and setting aside of the settlement agreement entered into between the Department of Public Works and the first Respondent and which was subsequently annulled by consent between the parties made an order of court on 16 May 2013.

[5] The two writs of execution referred to in Part A of the notice of motion were issued pursuant to the order by consent of 16 May 2013.

[6] In arguing for the granting of an interim interdict, the Applicants submitted that an applicant seeking interim relief must show:

(a) Prima facie right;

(b) Irreparable harm;

(c) Balance of convenience favours the granting of the interdict; and

- (d) Applicant has no other remedy.

Background

- [7] The Department of Public Works awarded a tender to a Joint Venture between Illima (Pty) Ltd and the first Respondent for the construction of the

Brits Hospital In August 2009 Illima was liquidated. Litigation between the two partners of the Joint Venture resulted in a court settlement in September 2009 allowing the first Respondent to continue with the hospital contract with

payments to be received and paid into a specific account. The Department of Public Works elected to repudiate and cancel the hospital construction contract

- [8] The first Respondent claimed that as a result of the repudiation itj has suffered damages. Negotiations were conducted between the Department of Public Works and the first Respondent which ended in the Department making a written settlement offer in the amount of R22 608 794.39 which was accepted by the first Respondent. The Department failed to pay the amount offered iand the matter came before court on 16 May 2013 after the filing of the required isets of affidavits. The events at court on that day culminated in the granting of! the consent order in the amount of R22 608 794.39 in favour of the first Respondent.

- [9] On 24 April 2014 an application by the Department of Public Works to have the consent order rescinded was dismissed by Hendricks J with a punitive cost order against the Department of Public Works.

- [10] The requirements for granting an interim interdict are settled law. These are: a prima facie right; a well-grounded apprehension of irreparable harm if interim relief is not granted and the ultimate relief is eventually granted; a balance of convenience favouring the grant of interim relief; and the absence! of similar protection by any other ordinary remedy. See *Setlogelo v Setlogelo* 1914 AD 221 at 227.

- [11] The Applicants argument is premised on Constitutional framework in that the settlement agreement entered into between the Department of Public Works

and the first Respondent was concluded in violation of section 217 of the Constitution of South Africa Act 103 of 1996 (“ the Constitution”). Section 217 provides as follows:

“217, Procurement

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must (io so in accordance with a system which is fair, equitable, transparent, competitive and cost! effective.

- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for -
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

[Sub-s (3) substituted by s. 6 of the Constitution Seventh Amendment Act of 2001]

- [12] As a result of this violation the submission by the Applicants was that the settlement agreement stands to be set aside and in the absence of which the first Respondent will have no claim against the Applicants or its departments, the Applicants further argued that the first Respondent was not entitled to remain in occupation of the construction site after the termination of the joint ventures as the Department of Public Works should have issued another tender process and it would have been open to the first Respondent to apply.
- [13] In seeking an order to stay the writs, the Applicants argued that the underlying settlement agreement which comprises the subject matter of the consent order was unlawfully concluded.
- [14] The first Respondent argued that the consent order novated the debt due to it as agreed in the settlement. Further that the said order was the result of the Department (represented by the State Attorney and eminent Senior and

experienced Junior Counsel) deciding not to continue the litigation in view of the severe hurdles in answering the first Respondent's case. The compromise which involved the first Respondent paying the costs of inter alia the Department of Health because it was not the contracting party was thus arrived at. The first Respondent's Counsel submitted that the same defences which the Applicants now wish to raise in respect of the settlement were clearly present to the minds of the Department and its legal representatives prior to and during the first Respondent's application.

- [15] The Court in the rescission application dealt extensively with the settlement agreement at par [6] to [12] in its judgment as follows:

"[6] It is clear that the settlement agreement was not a suddenly arrived at contract. The dispute over what was owed to Tsoga extended over some months. The parties met and in an adversarial manner, each put its case and sought to compromise the dispute on favourable terms to its interest and contentions. The Department's interest in the negotiations meeting was attended to by, inter alia, two legal representative of the Department. The Department drew up a written settlement agreement.

This document was after due consideration, signed by Tsoga and the Department: In it, the Department offered to settle the; Tsoga claim in a specific rand and cent amount to wit, R 22 608 794.39; The Department had months to consider its contractual position before making the offer of settlement. It suited the department to settle the Tsoga claim - amongst other considerations; it allowed the Department to contract with another entity to complete the work

[7] It was furthermore contended that the settlement agreement was then not only a document drawn up by the Department, advised by two legal representatives and presented as a settlement offer to Tsoga, but it was a document drawn in respect of a disputed claim by Tsoga, which the Department had months to consider and had first-hand expert advice

from its professional agents who were fully cognisant of the work done. It is clear that the settlement was a compromise of the JV's contractual claims under the construction contract for work done and damage suffered by reason of the department's purported cancellation of such contract.

[8] A compromise is a contract of a specific nature. The nature of such a contract is that it is concluded because the rights of the parties are uncertain, and they choose not to resolve that uncertainty. By the very nature of such a contract, there can be little room for finding that the parties must have intended their contract to depend upon the existence of one of the factors relevant to their respective rights. It is precisely to avoid testing them that they compromise,

[9] In return for the payment under the settlement, it was Tsoga's obligation to release the Department from all contractual liability arising from the contract vis-a-vis the JV. It "warranted" (clause I) this in an obligation drawn by the Department. The Department's settlement offer was clearly designed to take away the Department's risk with regard to the quantum of the approximately R30 million claim of Tsoga. It is clear that Tsoga at the outset demanded a higher amount than the eventual settlement amount from the Department, It is clear that there was a dispute about what was due to Tsoga under its contractual claim, Hence the amount was discussed and negotiated and eventually a settlement offer was made by the Department.

[10] Of cardinal importance is the fact that the Department had every opportunity to make its own assessment of the claim. It was its premises and it received the work done. In terms of the contractual regime the Department would value and pay for the work done and materials on site. This was not an onerous obligations foisted on it - that was what the Department would have to do under the contract. There is no reason why it could not do this exercise prior to settlement. It elected to run the risk of relying on its then assessment of the advanced claim. Moreover; a party to a settlement who wishes to impugn it even on the basis of a bad bargain induced by an extravagant claim, faces a formidable preclusion peculiar to compromises.

See:- Wilson Bavl (supra) at pages 343 and 345.

Gourlav v Canoa KZN (Ptv) Ltd i/a Canon Office Automation JOL 21005 (N) [91

[11] It is the Department's contention that work done by Tsoga is overstated, The Department simply cannot be heard to say Tsoga's claim was overstated. That would negate the very rationale of settlement. In short, the department is seeking to effectively rely on the merits of the compromised dispute.

The following is stated in the Gourlav case (supra) par [9]-[11]:-

"[9] It is clear that a compromise is a substantive contract which exists independently of the causa which gave rise to the compromise. Like any other contract, defences to an action based on such compromise may be raised such as duress. A defendant is not however entitled to reply on defences relating to the motives which induced him to agree to the compromise, or to the merits of the dispute which it was the very purpose of the parties to compromise. "

"[10] In the present case the appellant contended that he had concluded the agreement because he knew that it was the only way he-, would be paid before 1 March 2006 and needed the money for his forthcoming wedding. The appellant also contended because the amount was owed to him, it was never a load and consequently he was not bound by the agreement which reflected it as such. "

Per Mullins,} in Hamilton's case, supra , at 383 II- 384B.

"[11] These "defences11 to the enforceability of the agreement, attempt to rely upon the motives which induced the appellant, to conclude the agreement, as well as the merits o f the dispute which the parties sought to compromise. They therefore cannot be sustained. "

[12] It must be borne in mind that the Department had every opportunity and every reason and the obligation, to make its own assessment of its risk of liability and the potential quantum and its own claims before entering into a settlement agreement, In Cete v Standard and General Insurance Co Ltd 197 (4) SA 349 (W) at page 354 the Court stated:-

"A defendant himself has to prepare his case and undertake his own investigations, He is assisted in this by these Rules of Court. He is not absolved from the task. Rule 36 makes it clear, for instance, that he may require the plaintiff to submit to a medical examination conducted by his own medical advisors. Furthermore, as has been said in the two Transvaal cases to which I have referred, he is not entitled to know ho w the plaintiff assesses his damages. What the Rides entitle him to is to information which will enable him to make his own assessment. In other words, he is not the passive party who merely checks on what the plaintiff says. He has a duty himself to work out what is a reasonable assessment of the damage sustained by the plaintiff. "

[16] In par 34 of the said rescission judgment the court made the following finding:

.. The Department had months before the settlement to investigate the compromised claim. It had more than a year to decide on its position between the start of the litigation and the 16th May 2013. It filed an answering affidavit By then it had eveiy opportunity to investigate any facet of the settlement and raise any issue in the answer.

The pleadings had closed\ ”

- [17] The court went on further in the rescission application at par [4^] to display its dissatisfaction at how the Department was .delaying payment toj the first Respondent and stated the following:

“[42] The Department negotiated and drew up settlement agreement as far back as 29 June 2009, Almost four (4) years later it challenged the very same agreement in this Court (16 May 2013). The matter got settled for a second time which settlement agreement as embodied in a draft order, was made an order of court. The Department now challenge this order of court (the second settlement) some ten (10) months after it was made. On two previous occasions and after the passage of four years and ten months did the Department renege its agreement with Tsoga. Without any stretch of the imagination, this is an abuse of the process of court The Department must now honour its agreement without further delay and without further waste of time, money and resources, Tin Court will demonstrate its disquiet by ordering it to pay the costs on the punitive scale as'between attorney and client. ”

- [18] The submission on behalf of the Respondent that the defences raised, by the Applicants have always been available has merit. As stated above; by Hendricks J, the Department of Public Works had ample opportunity to consider the first Respondent’s claim with the advice of its legal representatives. Therefore the decision to enter into a settlement by the Department of Public Works was done after due assessment of the risk and liability was done. Jhc

claim by the first Respondent is not based on the settlement but rather on [the court order which is final and binding and the Applicants are not at this stftge attacking the court order. The writs of execution that are the subject matted of this application were issued pursuant to the final order of 16 May 2013. See the case of *Le Roux v Le Roux* 1967 (1) SA 446 AD at 463, where it was held that the judgment or order must be a final and definitive judgment (or order) on the merits of the matter and the judgment must be one of a competent court.

- [19] The Applicants further argued that the first Respondent has violated the provisions of section 226 of the Constitution by having a writ of execution attaching the revenue fund of the Department of Public Works. In terms of section 226 of the Constitution, funds from the revenue fund can only be withdrawn under two circumstances, namely (a) in terms of an appropriation by a provincial Act; or (b) as a direct charge against the provincial revenue fund provided for in the Constitution or a provincial Act. It is the Applicants argument that none of the above events have occurred in relation to this case.

- [20] In contention the first Respondent argued that there is no dispute that the Department is entitled to the monies kept in the Revenue Fund however not allowing for payment of a judgment debt will be an abhorrent suggestion directly undermining the rule of law.

- [21] In the case of *Golden Arrow Bus Services (Pty) Ltd v Minister of Transport and others* 2009 (5) SA 322 (C) it was held that:

"[23] Where then does one find a basis for holding that judgments against the State sounding in money constitute debts which are direct charges against the NRF or Provincial Revenue Fund, as the case might be? In my judgment the answer lies in s 165(5) of the Constitution which provides that '(a)n order or decision issued by a court binds all persons to whom and organs of state to which it applies \,J

"[24] Section 165(5) of the Constitution would be rendered an empty provision if the binding nature of orders or decisions of the courts did

not denote an obligation on all persons and organs of State to which such orders or decisions might be directed, to comply with them. Judgments sounding in money obviously fall within the ambit of orders or decisions referred to in s 165(5). If such orders or decisions were not to form a direct charge on government funds, the authority of the courts, established in terms of s 165 of the Constitution, would be undermined and if the efficacy of the courts' decisions in regard to judgments sounding in money against the State were rendered subject to permissive authority by another arm of government, namely the legislature, by the adoption of appropriating legislation, the separation of powers between the judicial, legislative and executive arms of government, which is part of the basic Constitutional framework of government in South Africa, would be contradicted."

- [22] The writs referred to in this matter emanate from a court order which was granted on 16 May 2013 and has not been complied with. The court order of 16 May 2013 is not being attacked in this application and therefore remains final and binding. The office of the Applicants did not, previously attempt to intervene in these proceedings despite having knowledge of the matter. The argument by the Applicants Counsel that the second Applicant only came into office recently cannot be sustained as his predecessors had full knowledge of the matter.
- [23] The Applicants argued that neither the Constitution nor the Public Finance Management Act 1 of 1999 as amended envisages a direct payment to a judgment debt. It further argued that the harm lies in the Applicants inability to fulfil its legislative mandate and provide services to ordinary persons who are not party to these proceedings as well as to govern its province effectively.
- [24] As stated in the case of *Golden Arrows supra* the final order of 16 March 2013 should be a direct charge to the Revenue fund to facilitate the withdrawal of funds in satisfying the first Respondent's claim.
- [25] The Applicants have known about this claim of the first Respondent at least since 16 May 2013 and again in April 2014 when the rescission application was dismissed. The order remains in force and has not been satisfied. The budget allocation for the Department of Public Works for the year 2014/2015 was done and no provision was made for the first Respondent's claim. As stated in *Golden Arrow supra* the authority of the courts as envisaged in section 165 of the Constitution should not be undermined. Failure by the Department of Public Works to comply with the order of court is in direct contravention of section 165 of the Constitution and to the prejudice of the first Respondent. The Applicants

cannot suddenly argue irreparable harm as no harm arose. The Applicants have not been able to show successfully that there will be irreparable harm suffered if the interdict is not granted,

- [26] The balance of convenience does not favour the, granting of an interim order as the writs were issued subsequent to a final court order in favour of the first Respondent.
- [27] The office of the Applicants had ample opportunity to intervene in this matter and raise any defence available to them. The Department abandoned their application for leave to appeal the dismissal of the application for rescission and since then there was no attempt by either the Department of Public Works or the Applicants to take the matter further.
- [28] It was argued on behalf of the first Respondent that the Applicants have no locus standi to bring this application as they were not contracting parties. It was further argued by the first Respondent that other departments other than the Department of Public Works, got costs orders in their favour against the first Respondent, in terms of the consent order of 16 March 2013, premised on the fact that they should not have been joined. On that basis it was the Respondents case that the Applicants lack locus standi to impugn the settlement agreement, a compromise, the consent order and the order of rescission.
- [29] The Applicants argued that this application is brought in terms of section 38 of the Constitution as there is a Constitutional violation. Further that the monies allocated to the Provincial government are not owned by specific departments. In relation to the writs, the Applicants' argument was that the application is brought in terms of section 3
- (10) of the State Liabilities Act 20 of 1957 as amended which permits a party having a direct and material interest to apply to the court which granted the order for a stay on grounds that the execution of the attached movable property (i) would severely disrupt service delivery, or (ii) is not in the interest of justice, It was submitted by the Applicants that it was the government of the Province of the North West represented by the Department of Public Works that concluded the agreement with the first Respondent.
- [30] In terms of section 3(10) of the State Liabilities Act the obvious party to bring the application to stay the writs is the Department of Public Works. This is in light with the provisions of section 3(10) (b) which provides that the concerned department must provide a list of movable property and the location thereof that may be attached and sold in execution of the judgment debt. It is clear again from the wording of section 3(10) that reference is made to the attachment of movable property which is to be sold. The second writ in the current matter has attached money in the account of the Department of Public Works which is sufficient to satisfy the judgment debt. I am in agreement with the argument by the Respondents that the provisions of the State Liability Act do not contemplate a challenge to the validity of the Judgment but rather the execution processes. In my view the Applicants cannot bring themselves under the State Liability Act so as to have locus standi to bring this application. The State Liability Act finds no application in this matter as the court order is not attacked and remains final and binding. On this ground, I find

that the Applicants have no locus standi in this matter.

Costs

[31] The submission by the Respondents' Counsel was that this application is an abuse of court process as the Applicants have had just about five (5) years and two full blown applications in the High Court to investigate the claim of the first Respondent. Further that the State organs involved in this litigation are indeed engaged in an elaborate game of snakes and ladders with endless rolling of the judicial dice. Therefore a punitive cost order should be made against the Applicants. I have carefully considered this submission and I am in agreement that this litigation has been before the High Court on two occasions and the

Court order granted remains final and unchallenged.. It is trite law that costs follow the result and in my view the Applicants should pay the costs of this application on a scale between Attorney and client which costs should include employment of two counsel.

Conclusion

[32] It is for the aforementioned reasons that I granted the order as set out in paragraph 1 herein.

DJAJE JT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING: 4 MAY 2015

DATE OF JUDGMENT: 4 JUNE 2015

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