

SOUTH AFRICA / JUDGMENT

Sebenza Shipping and Forwarding (Pty) Ltd v Passenger Rail Agency of South Africa Society Limited (43909/2016) [2018] ZAGPJHC 646 (21 November 2018) [2018] ZAGPJHC 646

COURT

South Gauteng High Court, Johannesburg

BEFORE

B Wanless

CASE / FILE NUMBER

43909/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

LOCAL DIVISION,

JOHANNESBURG

CASE

NO: 43909/2016

HELD

IN: JOHANNESBURG

In

the matter between:

SEBENZA

SHIPPING AND FORWARDING (PTY)

LTD Applicant

And

PASSENGER

RAIL AGENCY OF SOUTH AFRICA

SOCIETY

LIMITED Respondent

JUDGMENT

AJ Wanless

PROCEEDINGS ON 21 NOVEMBER 2018:

COURT CLERK: Calling the matter ...(inaudible) Sebenza Shipping and Forwarding and Passenger Rail Agency.

LEGAL REPRESENTATIVE: As it please your Lordship I appear for the Applicant.

COURT: Yes.

LEGAL REPRESENTATIVE: On behalf of the Respondent my Lord.

COURT: Yes. The Applicant in this matter is Sebenza Shipping and Forwarding (Pty) Ltd and the Respondent is the Passenger Rail Agency Society Limited. The history of this matter is as follows:

“The Applicant has applied to set aside, beg your pardon just for clarification Sebenza Shipping and Forwarding (Pty) Ltd will hereafter be referred to as the Applicant and Passenger Rail Agency Society Limited will be referred to as the Respondent. In this matter the Applicant has applied to set aside the notice of intention to enter the principal case filed pursuant to Rule 8, sub-rule 11 by the Respondent as a irregular step and further that the plea and counter-claim, more correctly claim-in- reconvention filed by the Respondent be declared an irregular step; ancillary relief and costs de bonis propriis. The Applicant instituted provisional sentence proceedings based on a letter purporting to acknowledge the indebtedness of the Respondent to the Applicant. Provisional sentence was granted against the Respondent in favour of the Applicant on the 28th of November 2017. In terms of Rule 8.11 a notice of intention to enter the principal case shall be filed within the two months from the date of granting of provisional sentence. The two month period in the premises expired on the 28th January 2018. The notice of intention to enter the principal case was filed on the 12th of June 2018 and the plea and counter-claim on the 25th of June 2018. The notice to remove the cause of complaint was filed on the 14th of June 2018. The Respondent opposes the application on the basis that the Applicant consented to the Respondent entering into the principal case. The Respondent also filed a counter-application in which the Respondent seeks that this Court condone the late filing of the notice to enter the principal case in the event of this Court finding that the Applicant did not consent.

With regard to the issue of consent the following facts are common cause on the application papers before this Court. On the 1st of December 2017, the Applicant addressed the issue of security de restituendo and stated inter alia that it proposed that the capital, interest and costs be paid into their Attorney’s trust account where it would be held pending the finalization of the principal case in the event of the Respondent pursuing same. The Respondent filed a notice of application for leave to appeal against the provisional sentence on the 18th of December

2017. The application for leave to appeal was dismissed on the 8th of February 2018. On the 8th of February 2018 the Applicant’s Attorneys via e-mail invited the Respondent to enter the principal case and confirmed that the security would be furnished as per their letter of the

5th, sorry, as per their letter of the 1st of December 2018. A petition to appeal to the Supreme Court of Appeal was filed on the 7th of May 2018 and dismissed on the 17th of May 2018. On the 17th of May 2018 the Attorney for the Applicant demanded payment. On the 21st of May 2018 the Respondent's Attorney replied and stated that payment should be made on the basis of the provisions of Rule 18.10 and should be made on the basis that their client was entitled to enter the principal case. On the 30th of May 2018 after certain correspondence had passed between the respective Attorneys regarding the calculation of the outstanding amount, the Respondent's Attorney stated inter alia that the monies once received by the Applicant's Attorneys would be invested in their trust account in terms of Section 78 (2A) and requested the Applicant's Attorneys to confirm the same. On the 31st of May 2018 the Applicant's Attorneys confirmed that the provisional sentence amount would be invested as per the undertaking of the 1st and 7th of December 2017 and as stated above. The undertaking was that these monies would be held in trust pending the determination of the principal case. A letter from the Respondent's Attorneys on the 8th of June 2018 records that the payment has been made, or had been made and once confirmation had been received from the Applicant of the receipt of those funds the Respondent would enter the principal case. On the 12th of June 2018 the Attorneys for the Applicant recorded that the monies were received and invested but went on to say that this should not be construed as an agreement that the Respondent was entitled to enter the principal case. In paragraph 4.46 of the founding affidavit the Applicant explains away the fact that an agreement was entered into on the basis that the Applicant's Attorney was "under pressure" and the agreement was that she would invest the monies and to treat same as "if the security de restituendo is valid pending the determination of whether the said security is valid". It is submitted on behalf of the Respondent that it is clear that the money was invested so that the Respondent would be entitled to enter the principal case and that the Attorney's suggestion to the contrary stands to be rejected. On the alternative leg of the Respondent's argument and one which relates to the aspect of condonation it is or it was held in the matter of Mahabro Investment (Pty) Limited vs Kara, 1980(2) SA 772, a decision of the then Durban and Coast Local Division, the following and I need, for these purposes read only from the head note of that case:

"Provisional sentence-entry into principal case - notice of intention to do so not served within period prescribed by Rule of Court 8 (11)."

"Provisional judgment accordingly transformed into a final one but what rules can do they can undo. Rule 27 caters as a matter of law for a default in compliance with Rule 8 (11). Court has the power if the Defendant makes out a case for the relief on the merits to extend the period, revoke the final judgment and thus reinstate the provisional one. The Court in that matter held inter alia that unlike the usual kind the final judgment for which Rule of Court 8 (11) provides is neither a jurisdiction decree in form nor a jurisdiction product in substance. It is nothing more than a creature of the rules. As such it is governed entirely by them. They fix a time limit for entry into the principal case. As an automatic consequence of default they then transform the provisional judgment into a final one but what the rules can do they can undo and Rule 27 caters as a matter of law for a default in compliance with Rule 8

(11). *On the basis of inter alia that decision it is submitted by the Respondent that this Court has the power to condone the failure to deliver a notice of intention to enter into the principal case and thereafter to plea within the two month period. It is important to note at this stage that in addition to the foregoing, Rule 27 of the Uniform Rule of the Court clearly provides for the fact that the parties can agree to extend these time limits. On the basis of this Court holding then that there was no agreement that the period of two months would be extended between the parties, the Respondent asks for condonation and relief in the form of being entitled to enter into the principal case. The grounds set out by the Respondent in respect of that condonation are as follows:*

“a. That the Respondent on the advice of it’s Attorney that the application for leave to appeal the proceedings suspended execution

did not enter into the principal case prior to the petition to the Supreme Court of Appeal.

- b. The Attorneys of the Respondent gave that advice on the authority of the full bench decision of Maketha versus Lyon 1998(4) SA 143, a decision of the erstwhile Witwatersrand Local Division, that the effect of the provisional sentence was final. This advice

obviously had not been given on the facts of that particular case as read with the present matter before this Court. Therefore

having regard to the provisions of Section 18 of the Superior Court Act 10 of 2013 the advice of the Respondent’s Attorneys was that the effect of the provisional sentence pending the application for leave to appeal was suspended.

- c. In Maketha versus Lyon (supra) the full bench found that the decision of the Court that the authenticity of the signature to the liquid document was final in effect.
- d. The Court of first instance in the current matter, that is the matter presently before this Court, found against the Respondent and held that the person who signed the acknowledgement of debt was authorised to do so. More correctly, it dismissed or disregarded the Defence raised by the Respondent at that stage of the proceedings that the signatory to the acknowledgment of debt was not so authorised.
- e. In the premises, the advice of the Respondent’s Attorneys was that the Maketha judgment supported the advice given and for this reason the Respondent did not enter into the principal case at an earlier stage or did not take the necessary steps to enter into the principal case within the two month period as provided for by the Rules of Court.
- f. However, in an unreported judgement of Chater v Meyer, 2010 case no: A881/07, a full bench decision of the Gauteng Provincial Division, Maketha had been held to be wrong. This is on the application papers before the Court and upon which the Respondent relies. This only came to the attention of the Respondent or more correctly, the Respondent’s Legal Representatives, when an answering affidavit was prepared on behalf of the Respondent in the present proceedings.

g. It is submitted by the Respondent that it is also apparent from the correspondence exchanged between them that both parties were aware at all times that the Respondent intended to defend the principal case and that both parties had reconciled themselves to that fact.

h. Insofar as the defence, and this obviously being a criteria in respect of the claim of the Applicant is concerned, the Respondent

relies on three defences:

1. That Vermeulen, the person who signed the acknowledgement of debt, was not authorised to sign same.
 2. That the claim is not competent having regard to underlying causa, that is, the written agreement entered into between the parties; and
 3. That the Respondent has a counter-claim, more correctly a claim-in-reconvention.
- i. The submission is made on behalf of the Respondent that the acknowledgment of debt was signed by a General Manager.
 - j. It is clear that the Respondent has pleaded that a General Manager is not authorised to bind the Respondent in the amount he purported to that being R6 218 223.86.
 - k. In support thereof the Respondent refers to a circular which circular restricts the authority of a General Manager to R1 000 000.00.
 - l. It is pointed out on behalf of the Respondent that in granting provisional sentence his Lordship Mr Justice Wepener found that the circular was restricted to sales.
 - m. In this respect it would, it was submitted, be an issue in any subsequent trial, on the case put forward by the Respondent, that Mr Justice Wepener had erred and that another Court might come to a different conclusion. In this regard the Respondent relied on certain sections or portions of that agreement which supported its case. This essentially lead to an interpretation of the agreement and it is the Respondent's case that if it is entitled to enter into the principal case another Court may well interpret the agreement between the parties differently to the interpretation provided for in the first instance when provisional

sentence was granted by Mr Justice Wepener. The Respondent then also relied on the question of the fact that it is not, or cannot allegedly be liable for outstanding storage costs since, once again relying on the agreement, storage costs are limited to 60 days only. Therefore the Respondent will maintain that it is not liable for payment of storage charges beyond the 60 day period agreed to in the contract and further that the contract does not provide for a variation in price”.

“The counter-claim referred to earlier in this judgment and which the Respondent wishes to ultimately rely is essentially in terms of an overpayment in an amount of R9 123 826.79. Finally, it is submitted on behalf of the Respondent that if condonation is granted to the Respondent to enter into the principal case that there can be no prejudice to the Applicant. It is trite law that when considering any issues of

condonation it is only necessary for a party seeking that condonation to set out triable issues in order to show that a particular party has a bona fide defence and thus satisfy that part of the inquiry. At this stage it cannot be said that any of the defences, (and this would also include the counter-claim on the potential counter-claim of the Respondent) raised by the Respondent and not bona fides within the correct meaning thereof. In passing, it is important to note that the Applicant relied heavily on the decision of Osman Spice Work CC v Corporate International (Pty) Ltd, 2005(6) SA 494, a decision once again of the erstwhile Witwatersrand Local Division, as authority for the fact that after the two month period a provisional sentence becomes a final judgment. Whilst this is undoubtedly, as a general principle, true the case of Osman (supra) is distinguishable from the present matter as it dealt with a case where the Defendant did not make payment at all. On the facts as set out earlier in this judgment it is held that the Applicant did indeed consent to the Respondent entering into the principal case. Hence the time limits prescribed therefore were extended, by consent, in terms of Rule 27. Having received the monies the attempt by the Applicant's Attorneys to shut the door on the Respondent cannot be countenanced in any way. Even if this Court is incorrect in this regard, condonation should, clearly on the facts as set out herein and with particular regard to the defences set out by the Respondent, be granted. The Respondent was not guilty of any wilful default and has raised bona fide defences to the Applicant's claim. The Applicant can suffer no prejudice if the Respondent is allowed to enter the principal case. With regard to the issue of costs the Court finally determining the action in this matter will be in a far better position than this Court to adjudicate the true merits of the application and counter-application. In the premises I make the following order:

1. The Applicant's application as set out in the notice of motion at pages 7 to 11 inclusive of the application papers is dismissed.
2. The late filing by the Respondent of its notice of intention to enter into the principal case under case number 43909/2016 is condoned.
3. The costs of the Applicant's application and the Respondent's counter-application are reserved for the decision of the Court hearing the action under case number 43909/2016.

I hand down that order."

LEGAL REPRESENTATIVE: As the Court pleases.

END OF COURT PROCEEDINGS

B Wanless

Acting Judge of the High Court: Gauteng Local Division

For the Appellant: Advocate TJ Magano

For the Respondent: Advocate M Smit

Dates of Hearing: 14 November 2018

Date of Judgment: 21 November 2018

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