

SOUTH AFRICA / JUDGMENT

Silvermoon Investments 278 CC v Slip Knot Investments 777 (Pty) Ltd (2142/2012) [2013] ZAECGHC 34 (5 April 2013)

[2013] ZAECGHC 34

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson

CASE / FILE NUMBER

2142/2012

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION –
GRAHAMSTOWN)

CASE NO 2142/2012

DATE HEARD: 07/02/2013

DATE DELIVERED:

05/04/2013

In the matter between

SILVERMOON INVESTMENTS 278CC

.....APPLICANT

and

SLIP KNOT INVESTMENTS 777 (PTY) LTD

.....1ST

RESPONDENT

THE REGISTRAR OF DEEDS,

KING WILLIAMS TOWN

.....2ND

RESPONDENT

JUDGMENT

ROBERSON J:-

BACKGROUND

[1] On 28 December 2012, following an application in terms of Rule 49 (11), I granted the applicant leave to execute an order granted by Pickering J on 19 July 2012, pending an application by the first respondent to the Constitutional Court for leave to appeal against the order of Pickering J. The application to the Constitutional Court for leave to appeal against Pickering J's order followed the dismissal by both Pickering J and the Supreme Court of Appeal of applications for leave to appeal. I shall refer further in this judgment to the first respondent as the respondent.

[2] On 11 January 2013 the respondent delivered an application for leave to appeal against my order of 28 December 2012. On 31 January 2013 the Constitutional Court dismissed the application for leave to appeal against Pickering J's order. The present application, which was launched on 23 January 2013, is for an order in the following terms:

"1 That the present application be heard as a matter of urgency, and that the forms and service provided for in the rules be attenuated accordingly in terms of Rule 6(12).

2 2.1 That to the extent that it is necessary, the Applicant's non-compliance with the formal requirements of Rule 30 be condoned.

2.2 That the First Respondent's notice of application for leave to appeal against the order under case no. 2142/2012 granted by the Honourable Judge Roberson on 28 December 2012 be set aside.

3 That the Applicant be granted leave to implement and execute forthwith, the order (annexed hereto marked "X") granted under case no 2142/2012 by the Honourable Judge Roberson on 28 December 2012 notwithstanding any application for leave to appeal against it, and notwithstanding any application for leave to appeal against this order, and notwithstanding any notice of appeal against this order, and upon such conditions as this Honourable Court deems meet.

4 Further and/all alternative relief.

5 An order that the First Respondent pay the costs of this application on a scale as between attorney and client, including the costs of two counsel."

[3] The application was set down for hearing on 31 January 2013 and on that day was postponed by agreement to 7 February 2013 in order that it could be heard simultaneously with the application for leave to appeal. At that stage the respondent's legal representatives were not yet prepared for the application for leave to appeal. At the time the application was postponed the decision of the Constitutional Court was not known. On 5 February 2013 the respondent withdrew the application for leave to appeal, with a tender of costs. In the light

of the decision of the Constitutional Court, the present application is moot except for the issue of costs. This judgment concerns that issue, as well as the issue of the costs of the application for leave to appeal.

[4] Pickering J's order was as follows:

"1. Respondent is ordered within 3 days of the date of this order to take all steps necessary and to sign all documents necessary to cancel the first covering mortgage bond B1793/2008 in favour of the Respondent and to take all steps and to sign all documentation to effect such cancellation, against the provision by or on behalf of the Applicant of an irrevocable bank guarantee for payment to the Respondent of the sum of R2,540,757,05.

2. In the event of Respondent failing to comply with paragraph 1 above within such period as set out therein, the deputy sheriff for East London be and is hereby authorized to take all steps and to sign all documentation necessary to effect the cancellation of the first covering mortgage bond B1793/2008 in favour of the Respondent.
3. Respondent is ordered to pay the costs of this application including such wasted costs as were occasioned by the application standing over on 10 July 2012 to 11 July 2012 and such wasted costs as were occasioned by the postponement of the application on 11 July 2012, and including also the costs of two counsel."

[5] The application before Pickering J (the main application) had its origin in a loan agreement entered into between the parties during 2007, in terms of which the respondent loaned, as bridging finance, the amount of R2 059 000.00 to the applicant. The loan was secured by a mortgage bond registered over the applicant's immovable property. This was the bond referred to in Pickering J's order. The applicant failed to repay the loan within the agreed time. At the time of the main application, the applicant was in the process of developing the immovable property as a residential township, on which freehold housing units were to be built for sale to individual buyers. The applicant wished to pay the amount outstanding on the loan in order that the bond could be cancelled. The applicant alleged that its sole member had entered into an agreement of sale of its interests in the applicant and that a portion of the purchase price was payable on cancellation of the bond, by way of a bank guarantee in favour of the respondent. It was a further term of the sale agreement that if the bond was not cancelled by 31 July 2012, the guarantee would be withdrawn and the agreement would be null and void ab initio. A dispute arose about the amount owing on the loan agreement. The applicant contended that the in duplum rule applied to the calculation, and that the amount owing was R2 540 757.05. The respondent contended that the in duplum rule was not of application, and that the amount owing exceeded R94 million. The dispute about the amount owing on the loan and the applicant's need to have the bond cancelled, led to the main application.

[6] One of the arguments raised by the respondent in the main application was that the in duplum rule offended the right to freedom of contract and its original purpose had fallen away. In dealing with this argument, Pickering J was of the view that it was "inconceivable

that any court, in abolishing the [in duplum] rule, would order that it be struck down retrospectively". In its application for leave to appeal to the Constitutional Court, the respondent submitted, inter alia, that the in duplum rule offended the right to equality entrenched in s 9 of the Constitution.

- [7] The founding affidavit in the Rule 49 (11) application referred, inter alia, to the alleged ongoing prejudice and irreparable harm suffered by the applicant as a result of the inability to execute Pickering J's order, namely cancellations and threats of cancellations of sales to individual purchasers, and an indication from the purchaser of the member's interest that he would withdraw from the sale. It also dealt with the prospects of success of an appeal to the Constitutional Court. In the answering affidavit the respondent in turn referred to the irreparable harm it would suffer as a result of the loss of its real security for the loan. It was common cause that the value of the property at that stage exceeded the amount of the bank guarantee which had been offered to the respondent. The respondent also referred to the remote prospects of recovering the amount it claimed was owing, once the member's interest in the applicant was transferred to a third party. The respondent further dealt with the prospects of success of an appeal to the Constitutional Court.
- [8] In deciding the application in terms of Rule 49 (11), I agreed with Pickering J's views on the prospects of a court abolishing the in duplum rule retrospectively, and was of the view that there was no reasonable prospect of success of an appeal to the Constitutional Court. I also considered the respective harm to the parties and concluded in all the circumstances that it would be just and equitable to grant leave to execute.

COSTS OF APPLICATION IN TERMS OF RULE 30 AND RULE 49 (11)

- [9] The application in terms of Rule 30 was brought on the basis that the execution order of 28 December 2012 was interlocutory and not appealable, and that the application for leave to appeal, given the poor prospects of an appeal and the respondent's persistence in bringing applications for leave to appeal, was an abuse of court process. The respondent on the other hand, was of the view that the order was appealable because it was final in effect, and denied that its conduct was an abuse.
- [10] In *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC), at paragraphs [10] to [12], the following was said with regard to the appealability of execution orders and applications for

leave to appeal against such orders:

"[10]

Before making an order to execute pending appeal, therefore, a court will have regard to the possibility of irreparable harm and to the balance of convenience of the parties, as the judge clearly did in this case. Having granted leave to execute, permitting an aggrieved litigant to appeal that execution order pending the final appeal would generally result not only in the piecemeal determination of the appeal, but would “stultify the very order . . . made”.

[11] Moreover, as has been indicated above, an order to execute pending appeal is an interlocutory order. As such, it is an order which may be varied by the court which granted it in the light of changed circumstances. To the extent, therefore, that a litigant considers that new circumstances have arisen which would impact upon the court’s

decision to order execution pending appeal, the litigant may approach that court once again to seek a variation or, where appropriate,

clarification of the order.

[12] All these considerations make it plain that it will generally not be in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution. Ordinarily, for an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted – a matter which would, by definition, have been considered by the court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail. If the applicant can show irreparable harm, that irreparable harm would have to be weighed against any irreparable harm that the respondent (in the application for leave to appeal) may suffer were the interim execution order to be overturned.”

(See also *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC) at paragraph [24].)

[11] In my view, given the respondent’s claim of irreparable harm in the Rule 49 (11) application and the ground of appeal with regard to the alleged irreparable harm to the respondent if Pickering J’s order was executed, the order of 28 December 2012 was notionally appealable. There is a distinction between appealability on the one hand, and the merits of an application for leave to appeal on the other. With regard to the submission that the application for leave to appeal was an abuse of court process, in my judgment when I granted the order for execution I specifically did not find that the conduct of the respondent was mala fide or vexatious. It follows that I am of the view that the application for leave to appeal against the order of 28 December 2012 was not an irregular step and the applicant would not have succeeded in that part of the application. It is therefore not necessary to consider the other grounds of opposition to the Rule 30 application.

[12] I am however of the view that the further Rule 49 (11) order was appropriately sought. The application for leave to appeal against the order of 28 December 2012 suspended execution. In the event of the application for leave to appeal not being set aside as an irregular step, the applicant was entitled to bring a further Rule 49 (11) application. Further, orders such as the

one sought in relation to any further applications for leave to appeal which might have been brought in the future, have been granted in other matters. (See *South African Druggists Ltd v Beecham Group* 1987 (4) SA 876 (TPD) and *Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 (SECLD).) Given the poor prospects of success of an appeal to the Constitutional Court as well as the relative prejudice suffered by the parties, which I dealt with in my previous judgment, a further Rule 49 (11) order for leave to execute would have been just and equitable. Given the respondent's determination to ward off execution pending the Constitutional Court's decision, it is highly probable that matters would not have ended there.

- [13] In the result, both parties have had some measure of success relating to the now academic merits of the application. In the exercise of my discretion, I am of the view that an appropriate costs order would be that each party should pay its own costs, including the costs which were reserved on 31 January 2013.

COSTS OF APPLICATION FOR LEAVE TO APPEAL

- [14] The applicant submitted that these costs should include the costs of two counsel. As already mentioned, the application for leave to appeal against the order of 28 December 2012 was withdrawn with a tender of costs on 5 February 2013, after it had been enrolled for hearing. The applicant was therefore entitled not to consent to the costs as tendered and to argue the issue of costs on 7 February 2013. The costs of two counsel were allowed by Pickering J in the main application with no suggestion by the respondent that they should be disallowed. The costs order which I made in the rule 49 (11) application was that the costs should be costs in the appeal and that such costs should include the costs of two counsel. The application for leave to appeal against my order included a number of grounds of appeal. The respondent's heads of argument in the present application included argument on the merits of the respondent's appeal not only against my judgment but also in some detail with the merits of the appeal against Pickering J's judgment. In these circumstances I am of the view that the costs of two counsel were justified, up to the date of the withdrawal of the application for leave to appeal.

- [15] It was submitted on behalf of the respondent that the costs of the application for leave to appeal should not include the costs of 7 February 2013. Reliance was placed on the judgment in *Freedland v Kohn* 1906 TS 239. The circumstances of that case are distinguishable and did not involve a request for the costs of two counsel, for which a special order is required.

ORDER

- [16] The following order will issue:

[16.1] Rule 30 and Rule 49 (11) application

Each party is to pay its own costs, including the costs which were reserved on 31 January 2013.

[16.2] Application for leave to appeal

The respondent is to pay the costs up to and including 7 February 2013, such costs to include the costs of two counsel up to and including 5 February 2013.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv I Smuts SC with Adv G Dugmore, instructed by Whitesides Attorneys,
Grahamstown

For the Respondents: Adv J Pretorius, instructed by Wheeldon Rushmere & Cole, Grahamstown

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