

SOUTH AFRICA / JUDGMENT

Tshiya Infrastructure Development (Pty) Ltd and Another v Standard Bank of SA Ltd and Another (5175/2017) [2017] ZAFSHC 228 (9 November 2017) [2017] ZAFSHC 228

COURT

Free State High Court, Bloemfontein

BEFORE

Molitssoane

CASE / FILE NUMBER

5175/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 5175/2017

In

the matter between:

TSHIYA
INFRASTRUCTURE DEVELOPMENT
1st
Applicant
(PTY)
LTD
THABISO
JOHANNES
KHOFU 2nd
Applicant
and
STANDARD
BANK OF SA
LTD 1st
Respondent
SHERIFF
OF DISTRICT OF
BLOEMFONTEIN
2nd Respondent

JUDGMENT

BY: MOLITSOANE AJ

HEARD ON:

2 NOVEMBER 2017

DELIVERED ON: 9 NOVEMBER 2017

INTRODUCTION

- [1] This is an application for the stay of sale execution of attached of vehicles for a period of 12 months or for such other period as this court may deem appropriate. The applicants also apply that the first respondent be ordered to return the motor vehicles which were attached and removed, and which were the subjects of instalment sale agreements between the first applicant and the first respondent. This application is opposed.

BACKGROUND

- [2] On or about the 12th June 2017 the first respondent instituted various actions against the applicants. The first claim was based on an overdraft facility while the five remaining claims involved instalment sale agreements in respect of motor vehicles the first applicant and the first respondent entered into. The second applicant bound himself as surety for the payment when due, of all present and future debts of the first applicant to the first respondent.
- [3] In terms of instalment sale agreements the first respondent remains the owner of the motor vehicles for the duration of the agreements and ownership would only pass after the first applicant has performed all his obligations in terms of the agreement. [See clauses 4.1 and 4.2 of the agreements marked

Annexure D].

- [4] It is common cause that the first applicant fell in arrears in respect of instalment sale agreements

as a result of which the first respondent cancelled the agreements and issued summons. Default judgment having been granted, first respondent proceeded to have a warrant of delivery of goods issued and the motor vehicles were attached, removed and handed to the first respondent.

SUBMISSIONS

BY COUNSEL

- [5] Mr Matzinger, for the applicants, submits that if a stay of execution is not granted, that will lead to real and substantial

injustice. He submits that the facts upon which this apprehension is grounded are based on the fact that the first respondent intends to sell the attached motor vehicles in a public auction and without a reserve price. According to him the first respondent does not intend to obtain the best possible price commensurate with the actual value of the property so as to reduce the liability of the first applicant. Lastly, he argues that the first applicant has procured a tender and the motor vehicles involved would be used in the project. If the motor vehicles removed are sold the first applicant runs the risk of the tender being revoked.

- [6] On the other hand, Mr Pienaar, for the first respondent, essentially contends that the applicants are not entitled to a stay of execution in circumstances where the applicants do not seek rescission of the judgment or do not dispute the causa of the execution.

THE APPLICABLE LEGAL PRINCIPLES

- [7] Stay or suspension of the execution is governed by Rule 45A of Uniform Rules of Court which provides as follows:

"The court may suspend the execution of any order for such period as it may deem fit."

- [8] The court has a discretion to order stay or suspension of execution. (Erasmus, Superior Court Practice, 2nd ed, Vol 2, p D1 603). Waglay J (as he then was) in *Gois t/s Shakespear's Pub v Van Zyl* 2011(1) SA 148 (CLC) summarised the general principles for the granting of a stay of the execution as follows at paragraph [37]:

"(a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.

- (b) The court will be guided by considering the factors usually applicable to interim interdicts except where the applicant is not asserting a right but attempting to avert injustice.

- (c) The court must be satisfied that:

- (i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s):

(ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.

- (d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed i.e. where the underlying causa is the subject matter of an on- going dispute between the parties.

- (e) The court is not concerned with the merits of the underlying dispute- the sole enquiry is simply whether the causa is in dispute."

- [9] In deciding whether or not to stay execution the court considers what would be just and equitable as between the parties. The court further enquires into the causa of the dispute between the parties. (See *Dumah v Klerksdorp Town Council* 1951(4) SA 519(Tl.

ANALYSIS

AND FINDING

[10] The applicants herein do not attack the validity of the default judgment. The applicants do not attack the underlying causa of the default judgment granted against them. The applicants do not even submit that the execution of the judgment was done

for an ulterior motive. It is in fact the case for the applicants that they do not wish to apply for the rescission of the default judgment granted herein. It is further not the case for the applicants that they wish to approach the court for the reinstatement of the agreements.

[11] It is common cause that the agreements between the parties have been cancelled, and only after such cancellations did the first respondent sue out summons, obtain judgment and execute. At the time when the first respondent executed in terms of the judgment granted in its favour, there was no agreement between the first applicant and the first respondent.

[12] The court in *Firm Mortgage Solutions (Pty) Ltd v Absa Bank Ltd 2014(1) SA 168 (WCC)* had the opportunity to consider the ambit, if any, of the discretion the court has to order the stay or suspension

of the execution in circumstances where there was no application for rescission of judgment like in this case before me. The court in answering this question with reference to Rule 45A posed the question: "Could it possibly be that Rule 45A envisages the exercise of an equitable jurisdiction unhinged by any legal causa but simply predicated on the equities of a case.

If this was the case, almost every default judgment, which provides for a sale in execution of a property, at some point is likely to require a second hearing, pursuant to stay in terms of Rule 45A. If this was intended, Rule 45A should so provide expressly or by clear, necessary implication. In my view it does not so provide...."

[13] My understanding of the contentions of the applicants is that they accept or consent to the judgment granted by default but they do not want to accept the logical consequences of the said judgment. There will always be a risk that property sold in a public auction will fetch a lower price than the market value of the said price. That cannot be the sole reason to tip the scales of justice and equitability in favour of the applicants. It has to be borne in mind that the first respondent is obliged as of law to mitigate its damages. If one accepts that:

1. The instalments sale agreements between the first applicant and the first respondent have been cancelled;
2. That the motor vehicles sought to be returned to the applicants belong to the first respondent as indicated in clause 4.1 of the instalment sale agreements;
3. That the said motor vehicles are currently in possession of the first respondent;

It becomes clear to the court that essentially what the applicants seek to achieve is to be granted time to pay the arrears and or outstanding amounts due to the first respondent. That which they seek to achieve is a matter between the parties and not for the court to decide.

[14] It should be noted that, in the determination of what is just and equitable between the parties, the court is obliged to have regard to the rights of both parties. First respondent also has the right to preserve its property. It also has the right to the benefit of an effective, enforceable judgment. It is my view that it will not be just and equitable to order a stay or suspension of the order herein.

ORDER

[15] The application is dismissed with costs.

MOLITSOANE, AJ

On behalf of applicant: Adv. A Montzinger

Instructed by:

Matlho Attorneys

BLOEMFONTEIN

On behalf of respondent: Adv. CD Pienaar

Instructed by:

EG Cooper Majiedt Inc

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