

SOUTH AFRICA / JUDGMENT

Van der Vyver N.O. and Others v Oss Vrystaat Kaap Bedryf Beperk and Another (5859/2015) [2016] ZAECHGHC 47 (21 June 2016)

[2016] ZAECHGHC 47

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S Jacobs

CASE / FILE NUMBER

5859/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION,

GRAHAMSTOWN

CASE

NO.: 5859/2015

In the

matter between:

PIETER SCHALK VAN DER

VYVER N.O.

1ST APPLICANT

(ID NO.:

[6.....])

(In his capacity as

trustee of the Diepfontein

Trust

IT713/2001)

MARINDA VAN DER VYVER

N.O.

2ND APPLICANT

(In her capacity as

trustee of the Diepfontein

Trust
IT 713/2001)
PIETER SCHALK VAN DER
VYVER N.O.
3RD APPLICANT
(In his capacity as
trustee of the Nuwe Begin
Boerdery
Trust IT 336/99/2)
MARINDA VAN DER VYVER
N.O.
4TH APPLICANT
(In her capacity
trustee of the Nuwe Begin
Boerdery
Trust IT 713/2001)
PIETER SCHALK VAN DER
VYVER
5TH APPLICANT
(ID
NO.: [6.....])
MARINDA VAN DER
VYVER
6TH APPLICANT
AND
OOS
VRYSTAAT KAAP BEDRYF
BEPERK
1ST
RESPONDENT
SHERIFF
OF THE HIGH COURT CRADOCK
2ND
RESPONDENT

JUDGMENT

JACOBS, AJ:

INTRODUCTION:

[1] This is an application for the confirmation of an interim order granted on 01 December 2015 as set out hereunder:

“[1.1] That the First and Second Respondents be and are hereby interdicted from commencing or continuing with the sale in execution against attached movable property of the Applicants scheduled by the Second Respondent, to take place on the 10th December 2015;

[1.2] That the First Respondent should be interdicted and ordered to accept the Applicant's Letter of Guarantee NO: 263/33636400 dated the 18th November 2015, issued by Nedbank on behalf of the Diepfontein Trust for credit of Oos-Vrystaat Kaap Bedryf Beperk to the amount of R5 000 000.00 (five million rand);

[1.3] That the First Respondent is interdicted and ordered to utilise the money as stated above in settling the debt of the Applicants in order of the oldest debt first;

[1.4] That the Notice of sale in Execution obtained by the First Respondent on the 21st October be set aside;

[1.5] That the First Respondent to pay the costs of this application on an attorney-client scale;

[1.6] That in the event of the Second Respondent opposing the application, the First and Second Respondent be directed to pay costs jointly and severally."

and the consideration of the First Respondent's counter application as set out hereunder:

"1 The Applicants immediately to return to the Respondents the assets described and referred to in paragraph 10.1.1, 10.1.2 and 10.1.4 of the Court Order under case number 790/2013 to wit:

1.1 604 Döhne ewes ("PSV") getatoeëer linkeroor. Linkervoor swaeltert gemerk. Regteroor skuins na agter.

1.2 A Welgr D 4000 baler (series number: 124601019).

1.3 JF Stoll GNT 3205 kneuser – first year of registration 2011 (series number: 2590101403).

(Herein after referred to as "the assets")

2 Failure to return the assets within five (5) days of this Court order, the Sheriff be authorised to attach same and return it to the First Respondent.

3 The First Respondent be ordered to deal with the assets in terms of the provisions of Section 127 of the National Credit Act 34 of 2005.

4 The Applicants to pay the costs hereof.

5 Further and/or alternative relief.

Both applications are opposed.

[2] Pieter Schalk van der Vyver is acting herein as First Applicant in his capacity as trustee of the Diepfontein Trust and as Third Applicant in his capacity as trustee of the Nuwe Begin Boerdery Trust. Marinda van der Vyver is acting as Second Applicant in her capacity as a trustee of the Diepfontein Trust and as Fourth Applicant in her capacity as trustee of Nuwe Begin Boerdery Trust. Pieter Schalk van der Vyver is further acting as Fifth Applicant in his personal capacity and Marinda van der Vyver is further acting as Sixth Applicant in her personal capacity. The First Applicant is duly authorised to act on behalf of all the Applicants in this matter. For convenience sake the First to Sixth Applicants/Respondents

will be referred to as the Applicants.

- [3] The First Respondent is Oos- Vrystaat Bedryf Beperk a Company with limited liability duly incorporated and registered in accordance with the provisions of the Companies Act, No. 61 of 1973. The Second Respondent is the duly appointed Sheriff of the High Court Cradock for the magisterial district of Cradock.

COMMON CAUSE FACTS

- [4] The Applicants have been farming in Cradock on the Farm Diepfontein when in 2008 the Diepfontein Trust started doing business with the First Respondent. The Diepfontein Trust secured from the First Respondent various loans and instalment sale transactions as contemplated by the Credit Agreements Act 75 of 1980 and later the National Credit Act 34 of 2005.
- [5] The Applicants signed an agreement with the First Respondent for a payment schedule that was entered into on the 15th of October 2014, which agreement was made an order of Court on the 25th November 2014 incorporating the Settlement Agreement between the parties. In terms of the order of Court, the Applicants had to make certain payments to the Respondents. The Applicants defaulted upon the payments ordered by Court.
- [6] It is upon the default of the Applicants that the First Respondent in terms of the Court order issued a warrant of execution which warrant was served on the Applicants on or about the 17th June 2015. The Second Respondent received instructions from the First Respondent to sell assets in the Notice of Sale in Execution on the 10th December 2015.
- [7] In the interim the Applicants started looking for alternative finance and acquired a loan for R5 000 000.00 (five million rand) from Nedbank. Nedbank also informed the Applicants that they will take over their debts but they will do so in a structured manner and subject to certain conditions.
- [8] The Applicants presented the First Respondent with the LETTER OF GUARANTEE provided by Nedbank and correspondence followed by email

with a view to have a trouble free transition from the First Respondent as creditor to Nedbank as Creditor of the Applicants. The

negotiations between the parties however broke down.

- [9] The question that stands to be decided is: does the granting of a guarantee stay the sale in execution in circumstances where the applicant failed to comply with a settlement agreement which was made an order of court and the applicants failed to adhere to the order of court.

Effect of non- compliance with order of court

[10] In *Kevin John Eke v Charles Henry Parsons* 2016 (3) SA 37 (CC) the issue of the status of a settlement agreement that was made an order of court was dealt with. Madlanga J in the majority judgment at para 29 stated:

“Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is the well-established test on the interpretation of court orders:

‘The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.’”

[11] In *Kevin John Eke v Charles Henry Parsons* (supra) at para 31 it is stated:

“The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes res judicata (literally, “a matter judged”). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a mandamus.”

The learned Judge proceeded at para 36:

“In sum, what all this means is that even with the possibility of an additional approach to court, settlements of this nature do comport with the efficient use of judicial resources. First, the original underlying dispute is settled and becomes res judicata. Second, what litigation there may be after the settlement order will relate to non-compliance with this order, and not the original underlying dispute. Third, matters that culminate in litigation that precedes enforcement are fewer than those that don’t.”

[12] Jafta J referring to the main judgment agreed with the decision of Madlanga J, but for different reasons and stated at para 57:

*“It is the inherent power sitting in section 173 which enables superior courts to convert settlement agreements of litigants into court orders. This means that the High Court was wrong to hold in cases like *Thutha* and *Tasima* that there is a class of court orders, based on settlement agreements, which are not enforceable as court orders and are regarded as nothing more than a record of the parties’ agreement.”*

At para 73 the learned Judge stated:

“A court order must bring finality to the dispute or part of it, to which it applies. The order must be framed in unambiguous terms and must be capable of being enforced, in the event of non-compliance.”

[13] In *Gois t/a Shakespeare's Pub v Van Zyl and Others* 2011

- (1) SA 148 (LC) Waglay J (as he then was) set out the general principles for the granting of a stay of execution at para 37 as follows:

“(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); and

(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 ongoing 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.”

- [14] In *Firm Mortgage Solutions (PTY) LTD and Another v ABSA Bank LTD and Another* 2014 (1) SA 168 (WCC) at para 6 it is stated with reference to Gois supra that:

“It is clear that what was intended in this case was that, where the causa for the execution is a judgment, and the judgment is placed in dispute because an application for rescission has been brought, grounds may well exist for the exercise of a favourable

discretion by a court.”

- [15] Erasmus in *Superior Court Practice Second Edition Volume 2:D1-604* in considering Rule 45A refers to *Firm Mortgage* supra and states that:

“It has been held that this rule does not provide a residual, equitable discretion to a court faced with a set of facts from which it is clear that the judgment had been properly procured and granted, no application had been brought for the rescission of the judgment, and the only basis on which a stay of execution was sought, was that the debt could be settled and that the discretion of the court should accordingly be exercised in order to allow for the debt to be settled, particularly since property sold in execution notoriously fetched a lower purchase price than otherwise would have been the case.”

- [16] In the present case there is no such application for the rescission of the judgment. The Settlement Agreement is clear and unambiguous.

There is therefore no possibility that the underlying cause may be removed. On the contrary, the Court order is not in dispute and is of full force and effect. In the circumstances the Applicants have failed to satisfy the Court that the applicants will ultimately succeed in establishing a clear right to the relief sought by them.

[17] In the premises I make the following order:

[17.1] Application dismissed;

[17.2] The rule nisi granted on 1 December 2015 is discharged;

[17.3] There will be an order in terms of prayers 1, 2 and 3 of the counterclaim;

[17.4] Applicants are ordered to pay the costs of the application as well as those of the counter claimant.

S. JACOBS

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants

adv. AJ PIENAAR

Instructed by

Netteltons Attorneys

Counsel for the respondents

adv. SJ REINDERS

Instructed by

Wheeldon Rushmere & Cole Inc.

Date of Judgment

: 21 June 2016

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Prepared on 10 October 2026 · Esheria