

SOUTH AFRICA / JUDGMENT

VJ Logistics Services (Pty) Ltd and Others v Fuchs Lubricant South Africa (Pty) Ltd (43596/2019) [2020] ZAGPJHC 396 (4 December 2020)

[2020] ZAGPJHC 396

COURT

South Gauteng High Court, Johannesburg

BEFORE

KJ Mogale

CASE / FILE NUMBER

43596/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 43596/2019

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

In the matter between:

VJ LOGISTICS SERVICES (PTY) LTD

First Applicant

ISHAAN HARPERSAD

Second

Applicant

VIJAYLUXMI CHARTUGOON

Third

Applicant

and

FUCHS LUBRICANT SOUTH AFRICA (PTY) LTD

Respondent

In Re:

FUCHS LUBRICANT SOUTH AFRICA (PTY) LTD

Applicant

VJ LOGISTICS SERVICES (PTY) LTD

First Respondent

ISHAAN HARPERSAD

Second

Respondent

VIJAYLUXMI CHARTUGOON

Third

Respondent

J U D G M E N T

MOGALE, AJ:

INTRODUCTION

1. This is an opposed application for summary judgment in which the applicant seek for the stay of civil proceedings pending the finalization of criminal proceedings.

FACTUAL BACKGROUND

1. The second applicant was an employee of the respondent for 10 years and resigned in 2018.
2. It is common cause that the respondent issued an application on the 10th December 2019 for the recovery of monies that were alleged to be misappropriated from the respondent in an amount of R2 602 240 96.
3. It is further common cause that preceding the main application, the respondent laid a charge of fraud against the second respondent with the Germiston Police Station based on the same facts as the main application. The criminal matter is currently at the pre-trial stage at the Specialised Commercial Crime Court at Palm Ridge Regional Court.

4. The applicant represented by Mr.Msimanga, alleges that he will suffer prejudice if the civil proceedings application is allowed to proceed before the criminal case is finalized, that making a sworn statement in which he will be required to deal with the same issues to be traversed in the criminal case, might serve to prejudice him and violate his rights in terms of section 35(1)(c) of the Constitutional which entails that, he should not be compelled to make any statements that could be used in as evidence against him.
5. He averred also that there cannot be any conceivable prejudice to the Respondent or any other person if civil proceedings application is stayed because:
 - a. In the criminal matter, the accused will have the inherent right to be presumed innocent until proven guilty. Whereas in a civil proceeding, the applicant will be required to give evidence in proceedings, his evidence may be compelled despite the potential that it may have to self-incriminate him.
 - b. The applicant's financial ability to defend the criminal proceedings will be eviscerated. The outcome of civil proceedings may also render him and his family homeless.
 - c. That the respondent is always faced with the choice of instituting the same application and approaching the Honourable court at the later stage. That there is no prejudice to it because were it to succeed in the main application, it would be awarded interest which will soften the perceived prejudice that the delay in finalization of the main application may create.
6. The respondent represented by Mr. Cooke opposes the application on the following basis:
 - a. The grounds raised by the applicant do not warrant the stay of the main application.
 - b. That a dispute of fact is not a basis for the stay of civil proceedings.
 - c. That the applicant has not filed an answering affidavit in the main application. Without an answering affidavit disputing the allegations in the founding affidavit, there can be no dispute of facts.
 - d. The defences raised are nothing more than an undue and vexatious attempt to delay the main application.
7. Arguments presented by both counsel dealt primarily with the issue of whether or not the court has the discretion to stay civil proceedings pending the finalization of criminal proceedings, and if so, under what circumstances the court will be entitled to exercise that discretion.
8. The judgment of Corbett J (as he then was) in *Du Toit v Van Rensburg*[1] is in my view a good starting point. In that matter, Corbett J was called upon to decide whether it was proper to grant a provisional

order of sequestration when criminal charges were pending against the respondent in respect of the same matters on which the sequestration

proceedings were founded. In dealing with this issue the learned judge summarised the legal position as follows at 435H – 436A:

“It has been held that where civil proceedings and criminal proceedings arising out of the same circumstances are pending against a person it is the usual practice to stay the civil proceedings until the criminal proceedings have been disposed of. The principle at the root of this practice is that the accused might be prejudiced in the criminal proceedings if the civil proceedings were heard first because he might have to give evidence in the civil proceedings and he might be subject to cross-examination or he might be compelled to disclose information in his possession before the criminal proceedings were disposed of. This principle has been applied regarding this type of application where an application is made for a provisional order of sequestration and it appears that the respondent is charged with the theft of the very amount which forms the subject matter of the claim upon which the application for sequestration is based.”

9. The learned Judge then held at 436B that the exercise of this discretion, under those circumstances, is dependent upon the question:

“as to whether there is a danger that the respondent will suffer prejudice in the criminal proceedings because of the granting of such order.”

10. The law relating to a stay of civil proceedings while criminal proceedings are pending has been dealt with by the Supreme Court of Appeal in the matter of Law Society of the Cape of Good Hope v Randell[2] where it was stated that:

“The issue, in this case, was whether to stay civil proceedings, a striking-off application pending the conclusion of a related criminal

matter. The facts were that Attorney R was involved in a property transaction. Consequent on it the state charged him with fraud and theft and then a law society applied for his striking from the roll. R counter-applied for a stay of the society's application pending completion of the criminal proceedings. He argued that answering society's case might prejudice him in the criminal proceedings. He argued that answering the society's case might prejudice him in the criminal proceedings. The court granted the application, reasoning that the law allowed a stay where there was a likelihood of prejudice and even where there was no compulsion to speak. The society appealed to the Supreme Court of Appeal. It considered the law and overturned the decision, holding that a likelihood of prejudice and a compulsion to speak were requirements for a stay.”

11. The SCA in Randell supra quoted the dictum of Nugent J in Equisec (Pty) Ltd v Rodriques and Another[3] where it was found that:

“There are two circumstances in which the first respondent will face the prospect of disclosing information which may be relevant to whether he has committed the offense with which he is now charged. Firstly, he is called upon in these proceedings to answer the allegations made against him by the applicant in the founding affidavit if he is to avoid his estate being placed under a final sequestration order. There is, of course, no legal compulsion upon him to do so. Where a court should

intervene to relieve a person of the perhaps difficult choices he faces in that regard was considered by me in Davis v Tip NO and Others[4]). I see no reason to depart from the conclusion which was reached in those cases. In my view, the choice which the first respondent may face between abandoning his defence to the civil proceedings or waiving his rights to remain silent does not constitute prejudice

against which he should expect to be protected by a court and I would not exercise my discretion in favor of the first respondent on these grounds alone.”

12. If one considers the above-quoted cases, it is clear that for this court to consider whether or not to stay civil proceedings while criminal proceedings are pending, the applicant must satisfy the court that, there is potential or element of State compulsion present before the court to divulge information in the civil proceedings and as a result, that will prejudice the applicant in the criminal proceedings.
13. This court only has to be satisfied that there is a danger that a person in that position might be prejudice in the criminal proceedings if the civil proceedings have not stayed. The qualification that there must be an element of state compulsion before a court can stay civil proceedings under these circumstances, was superimposed for the first time in the Davis.
14. The stated justification for Nugent J's insistence upon state compulsion is his assertion that despite the potential for an accused to disclose damaging information in the civil proceedings our courts have never considered the choice facing an accused under these circumstances to conflict with his right to remain silent in the criminal proceedings. He further held that our courts have always insisted upon a further element, namely state compulsion to divulge information, to be present before it can intervene.
15. The other reason proffered by Nugent J is that the section 25 (of the Interim Constitution) constitutional rights are not foreign to our common law and that that section did not enlarge upon the common law rights but rather sought to guarantee its future existence. He concluded that the law does not seek to protect an accused from making disclosures as a result of legitimate choices but rather where he or she is required to do so through state compulsion.
16. If one considers the applicant founding affidavit, the applicant acknowledged that they are aware that they have a legitimate choice not to be compelled to file an answering affidavit in the main application and the applicants further denied all the charges against them. They are well aware that their right to remain silent is an important element of the essential content of the right to a fair trial even though it's a hard choice.
17. The applicants' defense is that, if this application is dismissed, they will have to make a choice to file papers in the main application, the "likelihood" that there exists a bona fide dispute of facts which would warrant the referral to oral evidence. There is a likelihood that the main application is referred to oral evidence, the applicant will be asked to discover and where they fail default judgment will be granted against them and their property will be executable and their financial ability to defend the criminal proceedings will be eviscerated.

18. This court must be satisfied that there is a danger that the accused might be prejudice in the conduct of his defence in the criminal matter if the civil matter is allowed to proceed before the finalization of the criminal case.
19. I now turn to consider the facts of this matter in the light of the aforementioned legal principles.
20. The criminal trial at the Specialised Commercial Crime Court is currently at its pre-trial stage. There is no indication as to how far the investigations are. There is also no indication as to when will the matter be trial-ready. The respondent seeks for the recovery of the amount of R2 602 240 96. In the main application, the applicants denied the charges and are aware that they are not compelled to speak.
21. It is evident that in the present matter, the applicants have not raised any sustainable defence and as a result, I cannot find that there is a real danger that may serve to prejudice the applicants in the conduct of their defence in the criminal case. I agree with the respondent that, the defences raised, are nothing more than an attempt to delay the main application.
22. In these circumstances, I am satisfied that it is proper that both the civil proceedings and criminal proceedings run concurrently.
23. As the result, the following order is made:
 1. The application to stay is dismissed;
 2. The applicants' are ordered to pay the respondent wasted costs, and
 3. The applicants' are directed to file their answering affidavits if any, in the main application within 15 (Fifteen) days of the date of this order.

KJ MOGALE

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

DATE OF HEARING : 27 October 2020

DATE OF JUDGMENT : 04 December 2020

FOR THE APPLICANT : Adv Nadeem Alli

INSTRUCTED BY : Saleem Ebrahim Attorneys Inc.

FOR THE RESPONDENT : Adv Marc Cooke

INSTRUCTED BY : Edward Nathan Sonnenbergs

- [1] 1967
- (4) SA 433 (CPD)
- [2] 2013(3) SA 437(SCA)
- [3] 1999(3) SA 113(W)
- [4] 1996(1) SA 1152(W)
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