

REPUBLIC OF SOUTH AFRICA

29/8/17



OFFICE OF THE CHIEF JUSTICE
(GAUTENG DIVISION, PRETORIA)

CASE NO: 5529/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

22/09/2017



DATE

SIGNATURE

In the matter between:

SOUTH AFRICAN POST OFFICE SOC LIMITED
(Registration No: 1991/005477/06)

Applicant

and

EXTRA DIMENSIONS 1464 CC
(Registration No: 2005/058312/23)

Respondent

In re:

EXTRA DIMENSIONS 1464 CC

Plaintiff

And

SUID AFRIKAANSE POSKANTOOR LTD

Defendant

JUDGMENT

MOTEPE AJ:

Introduction

- [1] On 16 November 2016, the applicant launched an urgent application essentially for the suspension of the writ of execution issued by the respondent against the applicant, pending the finalization of the intended application for leave to appeal to the Supreme Court of Appeal. The application was served on the respondent at 15h57 on the same day, i.e 16 November 2016.
- [2] Almost 30 minutes later, at 16h29 on the same day, the respondent's attorneys gave an undertaking to stay the warrant of execution pending the applicant's intended application for leave to appeal in the Supreme Court of Appeal ("*the SCA*"). Because of this undertaking, the main dispute between the parties that led to the launching of the urgent application dissipated. The parties could however not reach any agreement on the issue of costs. The matter has therefor been enrolled on the opposed motion roll solely for the purpose of costs.

Brief background

- [3] On 26 January 2016, the respondent issued summons against the applicant in the amount of R1 064 415.39 with interest *a tempore morae* at the rate of 9% from 18 November 2016 until date of final payment. The applicant filed notice of intention to defend and was met with an application for summary judgment. Summary judgment was granted against the applicant on 30 May 2016. The

applicant lodged an application for leave to appeal which was dismissed on 27 October 2016.

[4] On 9 November 2016, the respondent caused the Sheriff to attend at the applicant's premises and remove assets in accordance with a writ of execution it had obtained. The applicant's attorneys then wrote a letter to the respondent's attorneys on 10 November 2016 informing them that they had obtained instructions to petition "*either the full bench or the supreme court of appeal since the application for leave to appeal was dismissed on 27 October 2016*". The respondent's attorneys were then requested to instruct the Sheriff not to remove the property pending the intended petition. In this letter, the applicant's attorneys undertook to serve papers on or before close of business on 18 November 2016.

[5] On the same day, the applicant's attorneys wrote a further letter withdrawing their earlier undertaking to issue and serve the petition by close of business on 18 November 2016. In this letter, they referred to the provisions of section 17(2)(b) of the Superior Court Act¹ ("*the Act*") pointing out that the applicant in fact has one month after refusal of leave to appeal to petition the SCA. They consequently demanded an undertaking from the respondent's attorneys by 16h00 of even date failing which the

¹ No 10 of 2013

applicant was to approach this Honourable Court on an urgent basis.

[6] Still on the same day, the respondent's attorneys wrote a letter in which it made it clear that it will be proceeding with the sale in execution. Later on the same day, they wrote a further letter to the applicant's attorneys affording the applicant until 16 November 2016 to serve and file its petition with the SCA.

[7] On 14 November 2016, the applicant's attorneys wrote a further letter in which they further requested an undertaking by the respondent to suspend the writ pending the petition to be filed within the timeframes permitted by the law. The respondent's attorneys rejected this request and instead gave an undertaking to suspend the execution of the writ only up until Friday, 18 November 2016. This prompted the applicant to launch an urgent application. The prayers in its notice of motion read as follows:

"1 *That noncompliance with the rules be condoned and that the matter be heard as urgent in terms of rule 6(12)(a) of the Uniform Rules of court;*

2 *That the respondent be interdicted from removing the applicant's assets pending the finalization of the intended*

application for leave to appeal to the Supreme Court of Appeal;

2.1 *Alternatively the writ of execution issued by the respondent against the applicant be suspended pending the finalization of the intended application for leave to appeal to the Supreme Court of Appeal;*

3 *Respondent be ordered to pay costs of this application on attorney and own client scale;*

4 *Further and alternative relief."*

[8] As already indicated above, upon receiving this application, the respondent gave an undertaking within approximately 30 minutes.

[9] The applicant contends that the insistence by the respondent on filing the petition on or before 18 November 2016 was not only impermissibly truncating the timeframes appointed by the law but was also unreasonable. The respondent on the other hand contends that it had a Court order in its possession and it was therefore entitled to remove the applicant's assets.

[10] There are competing interests in this matter. Firstly, in terms of rule 45(1), a judgment creditor may, at his or her own risk, sue out

of the office of the Registrar one or more writs for execution thereof. In terms of section 18(1) read with 18(5) of the Act, an application for leave to appeal which has been properly lodged with the Registrar in terms of the applicable rules suspends the operation of that order pending the decision of the application or appeal.

[11] It is common cause in *casu* that when the respondent instructed the Sheriff to remove the movable assets, no petition had been lodged with the Registrar of the SCA as yet. The Court order was therefore not suspended. On the other hand, and as the applicant correctly points out, section 17(2)(b) afforded the applicant one month from the dismissal of its application for leave to appeal to petition the SCA. It is further common cause that when the Sheriff was so instructed by the respondent and when the urgent application was launched, this one month period had not yet lapsed.

[12] In my view, the respondent was within its rights to act on its writ up until 10 November 2016. However, after being informed that the applicant intended petitioning, it ought to have afforded the applicant the 30 day period permitted by the Act. It was unreasonable to proceed with writ after this period or to refuse to halt it for the said 30 day period when there was a clear intention from the applicant's attorneys, communicated to the respondent's attorneys, that the applicant intended petitioning the SCA.

[13] The express intention to petition was a sufficient reason for the respondent to give the requested undertaking. If the respondent still intended executing the order even after the petition is filed, it could have done so in accordance with section 18(1) read with 18(3) of the Act. These provisions afford a litigant an opportunity to obtain immediate relief upon *inter alia* showing irreparable harm, even in the face of a properly launched application for leave to appeal.

[14] To show that the respondent's attitude was unreasonable, it immediately gave an undertaking within 30 minutes of being served with the urgent application. In the premises I find that the applicant was justified in bringing the urgent application when it did. The attitude of the respondent was unreasonable and should be mulcted with costs.

Order

[15] In the premises, I make the following order:

1. The respondent is ordered to pay the costs in the urgent application up to and including 16h30 on 18 November 2016 on an attorney and client scale and to pay the costs from 19 November 2016 to the date of this judgment on a party and party scale.



JA Motepe

Acting Judge of the High Court

Matter heard on: 14 August 2017

Judgment reserved on: 14 August 2017

Counsel for the applicant: Mr K Manamela

**Attorneys for the applicant: Manamela Marobela and Associates
Pretoria**

Counsel for the respondent: Ad DE Coetzee

**Attorneys for the respondent: Coetzee Schoeman & Fourie
Pretoria**