IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 3012/2010
Date Heard: 29 November 2011
Made available: 1 December 2011

In the matter between:

TILE 'N BRICK DISTRIBUTION CC	First Applicant
MOHAMED DESAI	Second Applicant
and	
AFRIMAT READYMIX (CAPE)(PTY) LTD	Respondent

REASONS

EKSTEEN J:

[1] This is an application for the postponement of the trial herein which is currently set down for hearing on 7 December 2011 and the stay of proceedings until the finalisation of the "criminal proceedings pending". Upon the conclusion of argument I dismissed the application with costs and indicated that my reasons would follow. These are my reasons.

[2] The claim of the respondent against the first applicant is for goods sold and delivered and against the second applicant in his capacity as surety for the first applicant. In the application papers the applicants' allege that the respondent duly made discovery in accordance with the

Rules of Court. The applicants' representatives duly called for certain of the documents discovered to be delivered. Such documents were delivered to the applicants on 14 October 2011 and ran to approximately 350 pages. The essential basis for the present application is then set out in the application papers as follows:

> "18. It was during consultation in preparation for trial that it became apparent that an extensive case docket had been filed with the South African Police Services (SAPS). … The following important information came to light:
>
> 18.1 That two captains in the police services had been tasked with investigating these matters, namely, Captain Brown and Captain Ferreira;
>
> 18.2 A statement had been filed with the SAPS indicating an extensive web of fraud and forgery at the Respondent's offices in Port Elizabeth;
>
> 18.3 There are some 30 Annexures to the Respondent's statement to the SAPS which outline and detail the nature of the fraud and forgery which has allegedly occurred at the Respondent's Port Elizabeth offices.
>
> 18.4 Many of the allegations involve the conduct of Mr Jason Cloete, who was the regional manager of the Respondent.
>
> 18.5 The allegations are extremely detailed and even go as far as showing the trip sheets and GPS

monitoring for the individual delivery trucks on a minute by minute basis.

18.6 The allegations are of such a nature as to incriminate the First Respondent (*sic*) and I in fraud and forgery, which incriminations I deny. …

18.7 The exact amount of the fraud which the Respondent alleges is unclear to me but if it alleges, as it presumably does, that I was part of some general scheme to defraud the Respondent, then it appears that the overall loss which the Respondent alleges may be excess of R500 000,00. This would result, in the event of a conviction, of (*sic*) a minimum sentence of 15 years. At this stage I am not able to fully understand the implications of the Respondent's allegations or the exact amounts. I again deny these allegations."

[3] The applicants proceed to state that the allegations regarding fraud and forgery "revolve around the same factual matrix" as does the pending civil proceedings herein. The effect of all of this, it is alleged, is that the second applicant may be forced to give evidence, be subjected to cross-examination and/or be compelled to disclose information in his possession which may be related to the criminal matter, prior to the criminal matter being disposed of.

[4] Mr ***Moorhouse,*** on behalf of the applicants, relies heavily on the principles set out by Corbett J (as he then was) in **Du Toit v Van**

Rensburg 1967 (4) SA 433 (C) at 435H-436B were he stated as follows:

> "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 subjected to cross examination or he might be compelled to disclose information in his possession before the criminal proceedings were disposed of. This principle has be applied in regard to 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."

[5] It is immediately apparent from the aforegoing that these considerations apply only where civil proceedings and criminal proceedings arising out of the same circumstances are pending. In the present matter, however, there are no criminal proceedings pending. At best there is an investigation underway relating to some alleged wrongdoing on the part of the applicants, which wrongdoing the applicants deny. Whether or not criminal proceedings will be instituted in due course is currently uncertain. These circumstances are very different from those postulated by Corbett J in the ***Du Toit*** (*supra)* matter to which I have referred above. In circumstances where there is no certainty that criminal proceedings will be instituted the court will not interfere except

upon very cogent grounds (see ***Van Tonder v SA Railways Administration***; ***Baerveldt v SA Railways Administration*** 1929 TPD 128; ***Township Management Consultants (Pty) Ltd v Simmons*** 1991 (3) SA 456 (W) and *Herbstein and van Wissen:* ***The Civil Practice of the High Courts of South Africa****,* 5th ed, p. 314).

[6] The relief sought in this matter is in the discretion of the court. I am not able from the allegations made in the founding papers to draw any conclusion as to the probability or improbability of criminal proceedings being instituted at some future stage nor am I able to gauge the likely duration of the investigation. All of this is speculative. I think that the respondent has a right and an interest to insist on the adjudication of its claim without undue delay founded upon mere speculative contingencies. (Compare ***Township Management Consultants'*** case (*supra*).)

[7] It was further held in the ***Township Management Consultants'*** case (*supra)* that the applicant for a stay of proceedings in circumstances where it is uncertain whether criminal proceedings will be instituted is required to establish a risk of real prejudice consequent upon answering any of the applicants' material assertions by reference to each assertion with an indication of the detriment implicit in the answer thereof. This the applicants have not done. In the circumstance I think accordingly that the application for the stay of proceedings must fail on this ground

alone. No other ground is advanced in the application for a postponement of the trial and it follows, I think, that the application for a postponement of the trial must likewise fail.

[8] In any event, the principle contended for Corbett J finds application in circumstances where the applicant for a stay of proceedings may <u>have to</u> give evidence in civil proceedings and might be subjected to cross-examination or might be <u>compelled to disclose</u> information in his possession before the criminal proceedings are disposed of. These circumstances exist, as enunciated by Corbett J in the passage quoted above in sequestration proceedings and liquidation proceedings. In insolvency proceedings, by way of example, the insolvent may be compelled to attend meetings of creditors and may be compelled to testify on oath and to answer questions whether or not they are incriminating in nature. He may be compelled to provide information in respect of his affairs. His failure to comply would constitute a criminal offence. (Compare for example section 65, 66, 136 and 138 of the Insolvency Act, 24 of 1936.) The Companies Act, 61 of 1973 contained similar provisions. Thus in ***Irvin and Johnson Ltd v Basson*** 1977 (3) SA 1067 (T) Trengrove J at 172H said:

> "The principle, as I understand it, is that, if it is shown that proceedings in an insolvency, and the examination of an insolvent, are likely to prejudice the insolvent in his defense in related criminal

> proceedings, the Court has a discretion to stay all proceedings against him until the criminal proceedings have been concluded."

[9] In the unreported decision of ***Havenga v Rheede NO and Another*** (delivered in the then Transvaal Provincial Division on 25 March 1988) Kriegler J (as he then was) referred with approval to the aforestated dictum in ***Irvin and Johnson Ltd v Basson***. He then concluded as follows:

> "Die beginsel onderliggend aan die praktyk is duidelik, naamlik regverdigheid teenoor 'n persoon wat 'n strafsaak moet tegemoetgaan en wat onberekenbaar benadeel kan word as hy onder wetregtelike verpligting staan om sy hand te openbaar nog voor die strafsaak begin."

[10] What Kriegler J considered was therefore the statutory compulsion resting on an accused to show his hand. This dictum was in turn quoted with approval by Brand AJ (as he then was) in ***Kamfer v Millman and Stein NNO and Another*** 1993 (1) SA 122 (C).

[11] In ***Davids v Tip NO and Others*** 1996 (1) SA 1152 (W) Nugent J (as he then was) had occasion to consider all the authorities prior to that date relating to this principle and concluded as follows at 1157E-G:

> "Civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it will often serve his interests in the civil proceedings

> to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings. Where the Courts have intervened there has always been a further element, which has been the potential for State compulsion to divulge information. Even then the Courts have not generally suspended the civil proceedings but in appropriate cases have rather ordered that the element of compulsion should not be implemented. (Compare *Du Toit v Van Rensburg* 1967 (4) SA 433 (C) at 437A/B; *Gratus & Gratus (Prop) Ltd v Jackelow* 1930 WLD 226 at 231; *Kamfer v Millman and Stein NNO and Another* 1993 (1) SA 122 (C))."

[12] This interpretation has consistently been followed in Gauteng and in the Cape, I think correctly. (See ***Seapoint Computer Bureau v McCloughlin and De Wet NNO*** 1997 (2) SA 636 (T); ***Esquisec (Pty) Ltd v Rodriques and Another*** 1999 (3) SA 110 (W); ***Nedcor Bank Ltd v Behardien*** 2000 (1) SA 307 (C); ***NDPP v Mohamed*** [2003] 2 All SA 548 (C); ***Mitchell and Another v Hodes and Others NNO*** 2003 (3) SA 176 (C); and ***NDPP v Prophet*** 2003 (6) SA 154 (C).) Save as set out below I am not aware of any decision subsequent to ***Davis v Tip NO*** in any other Court which has come to a different conclusion.

[13] During argument, however, I was referred to two decisions in this Division. The first is ***Groenewald NO and Another v Swanepoel*** 2002 (6) SA 724 (E). This was an appeal in which the Full Bench in this Division referred to what they considered to be a misdirection by the trial Judge. They then proceeded at 727G-I to state as follows:

> "It may be that the learned Judge had in mind the well-known principle that, where civil proceedings and criminal proceedings arising out of the same incident are pending against a person, the civil proceedings may, in certain circumstances, be stayed until the criminal proceedings have been disposed of. In *Du Toit v Van Rensburg* 1967 (4) SA 433 (C) at 435H-436A Corbett J stated that the principle at the root of such practice is that the accused might be prejudiced in criminal proceedings if the civil proceedings were heard first because he might have to give evidence in the civil proceedings or he might be compelled to disclose information in his possession before the criminal proceedings were disposed of. For criticism of the wide ambit of the principle as stated by Corbett J, see *inter alia*, *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C) at 31 *et seq."*

[14] I do not consider this passage to advance the argument at all. The correct ambit of the principle which the court postulated that the trial Judge might have had in mind is not the subject of the judgment neither is there any attempt in the judgment to consider same. I was also referred to a recent unreported decision by Smith J in the matter of ***Randall v Cape Law Society*** (case no. 2646/11, Grahamstown) in which Smith J concluded that the above quoted passage from the judgment in ***Davis v Tip NO*** (*supra*), and by implication all those cases which have approved thereof, was incorrect. I have considered the reasoning in ***Randall's*** case and I have serious doubt as to the correctness of the conclusion arrived at by Smith J. By virtue of that which I have already recorded before I do not, however, need to make a finding in this regard. In ***Randall's*** case criminal proceedings were

indeed pending and the matter is accordingly distinguishable from the present.

[15] I conclude with reference to the judgment of Navsa J (as he then was) in the matter of ***Seapoint Computer Bureau –*** case, *supra*, which was a similar case, *at* 649F-G where Navsa J stated as follows:

> "The improper application of the principle will cause the administration of justice to fall into disrepute. To protect the right to remain silent is eminently desirable. To deny a plaintiff recourse to a judgment to which he may be entitled, because a police investigation against the opposing party may materialise, and where the defendant is not subject to coercive means, is not serving the course of justice."

[16] I agree with this statement. This is indeed such a case where criminal proceedings "may materialise" and therefore, for the reasons which I have stated before, I do not think that the application for the stay of proceedings can succeed.

[17] In the result, I ordered that the application be dismissed with costs.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Applicants: Adv *Moorhouse* instructed by Angus Hornigold Inc., Port Elizabeth

For Respondent: Mr *Spruyt* instructed by Friedman Scheckter, Port Elizabeth