IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH) CASE NO: 116/2011

Heard on: 20 August 2013
Delivered on: 17 September 2013

In the matter between:

DERECK CECIL PLATT APPLICANT

vs

BEVERLY-LYN PLATT RESPONDENT

JUDGMENT

<u>MAKAULA J</u>:

A. *<u>Introduction</u>:*

[1] This is an application in terms of **Rule 45A of the Uniform Rules of Court** wherein the applicant seeks the following orders:

"1.1 Directing that this matter be heard as one of urgency and that the time limits, forms and service provided for in the Rules of Court are dispensed with in terms of the provisions of Rule 6 (12);

1.2 That the applicant's compliance with the order of court dated 29 April 2013 to the extent of R656 951.10 be and is hereby suspended pending the resolution of the dispute between the parties arising out of the settlement agreement dated 29 April 2013;

1.3 That the respondent institutes such action as he may be advised to do within 30 days of the granting of this order;

1.4 Costs only in the event of opposition."

[2] In essence the applicant seeks to purge his contempt of the order granted by this court dated 29 April 2013 pursuant to divorce proceedings between the parties. The parties consented to a Deed of Settlement which was made an order of court in terms of which the applicant was obliged to pay the respondent **R3 000 000.00** in full and final settlement of any patrimonial claim which the respondent might have against the applicant upon fulfilment of the following conditions *(which are now relevant to this application);*

"2.2 The Plaintiff shall:

2.2.1 Resign immediately from Umgamanzi (Pty) Ltd and shall forthwith transfer to the First Defendant her entire right, title and interest to any shareholding and loan account in one indivisible transaction;

2.3 . . .

2.4 The Plaintiff warrants that she has made a full disclosure of all the liabilities in Umgamanzi (Pty) Ltd, including those listed in "A" hereto, the costs of the liquidation application, and the costs of provisioning and fuelling the vessel for its current voyage."

B. *<u>Applicant's case</u>*:

[3] The applicant alleges that the respondent has breached the undertaking and warranty contained in paragraphs 2.4 of the settlement agreement in that she had failed to disclose the following liabilities of **Umgamanzi** which were due as at 29 April 2013:

"15.1	Squid Council Levies	R1 890.00
15.2	I & D Radio Communications	R 863.79
15.3	Workmen's Compensation	approximately R650 000.00
15.4	South African Revenue Services	R3 157.31
15.5	Pastel Payroll	<u>R1 050.00</u>
	TOTAL	R656 961.10"

[4] With regard to the **Workmen's Compensation**, the applicant avers that based on the advice of his accountant **Mr Rodney Smith** *(Smith)* of **Liandor Financial Accountants (Pty) Ltd**, who has also deposed to an affidavit, **Umgamanzi** was supposed to have registered its staff with the **Workmen's Compensation Commissioner** *(WCC)* and the failure to do so has resulted in a due payment before interest and penalties of between **R380 000.00** and **R650 000.00**. The applicant contends therefore that the value of **Umgamanzi** was overstated by the respondent by approximately **R659 961.10.** The applicant admits therefore that for the reasons stated, he short paid the respondent in the aforesaid amount and thus is in contempt of the order of this court. The applicant seeks an indulgence for leave to suspend his obligation to pay the respondent an amount of **R656 961.10**

pending the outcome of the resolution of the dispute between them with regard to the undisclosed liabilities.

[5] The applicant makes the point that the entire settlement agreement is predicated on **Umgamanzi** existing as a fishing company with rights. The applicant avers that the fishing rights attaching to the vessel utilized by **Umgamanzi** are soon to terminate and **Umgamanzi** would have to apply for renewal of the seven year rights and that necessitates **Umgamanzi** to comply with certain statutory precepts. It is thus imperative that **Umgamanzi's** statutory records be in order amongst which are the Workmen's Compensation Returns, so submits the applicant. The applicant argues that failure to have the statutory records in order would disqualify **Umgamanzi** and render the applicant's take-over of **Umgamanzi** worthless in which case the applicant would have paid the respondent **R3 000 000.00** for no reason.

[6] The applicant suspects that there still could be liability to the **South African Receiver of Revenue** *(SARS)* flowing from the fact that the skipper of the vessel has apparently not paid any statutory contribution to **SARS** for tax and therefore there exists a possibility that **Umgamanzi** could be owing **SARS** an amount equal to **33%** of its gross earnings together with interest and penalties by virtue of the respondent's failure to cause **Umgamanzi** to comply with the provisions of the **Fourth Schedule and Section 231 of Act 58 of 1962**. The applicant contends therefore that the issues regarding statutory compliance have not been resolved and the accountants of both parties are working towards the resolution thereof.

C. ***<u>Respondent's case</u>:***

[7] The respondent on the other hand contends that the liabilities as stated in 'annexure A' to the settlement agreement were prepared by **Umgamanzi** bookkeeper, one **Heather Poole** *(Ms Poole)*. Neither the respondent nor **Ms Poole** were aware of any other liabilities not disclosed. The respondent maintains that she stands by the warranty she made and that should the applicant be able to establish a breach thereof, the applicant is at liberty to claim for damages in contract. The respondent contends that the only liability she was aware of, amounted to **R740 025.44,** chief of which was that of **VAT** which amounted to **R580 438.00**.

[8] The respondent states that at the time of signing the settlement agreement, she was not aware that there was an amount owing to the **WCC**. However, the respondent's accountant advised her that on information supplied to him by the respondent, there is a potential liability to the **WCC**. The respondent further contends that not only as an initial Director of **Umgamanzi**, the applicant was aware that the fishermen on the boat were not regarded as *'workmen'* for the purposes of determining whether **Workmen's Commission** levies were payable. The approach was that the fishermen would sell their catch to **Umgamanzi** and be remunerated through their catch and not wages and therefore would not qualify as levies, in terms of the definition of *'Workmen'.*

[9] The respondent denies that the applicant has established a *prima facie* right to the order sought because there is no basis alleged by the applicant for the *causa* for the payment of **R3 000 000.00** as settlement of the patrimonial claim to be set aside. The respondent further denies that the applicant has a well grounded apprehension of irreparable harm because the respondent had received an amount in excess of **R2 000 000.00** and owns an immovable property in **Port Elizabeth** and therefore, the applicant could still sue in contract and recover what is due to him. The respondent further argues that the balance of convenience favours her in that she needs the money in order to pay for the house for her and their daughter.

[10] **Mr Royden Whitfield** *(Whitfield),* an accountant for the respondent in his supplementary affidavit states that based on information supplied to him by the respondent there is a potential liability to the **Workmen's Commissioner**. In **Whitfield's** opinion the monies paid to the Skipper of the fishing vessel according to **VAT** invoices are not subject to **Workmen's Compensation levies** and thus would reduce **Umgamanzi's** liability to the Workmen's Commissioner by a significant amount.

[11] **Mr Smith,** an accountant for the applicant, opines that the fishermen are employees for the purposes of both **Act 58 of 1962** and the **Workmen's Compensation Act, Act 30 of 1941** which has since been repealed by **Compensation for Occupational Injuries and Diseases Act 130 of 1993.** However, **Smith** concedes that the skipper through applicant's registered **Close Co-Operation** *(CC)* which was a **VAT** vendor, billing **Umgamanzi**

could reduce the **Workmen's Compensation levies**. The enquiries made by the applicant as to whether the skipper's registered **CC** is an employment entity in terms of the **Fourth Schedule and Section 23 C of Act 58 of 1962** bore no fruit. The applicant submits that what can be deduced therefore is that liability in respect of **VAT** and **Workmen's Compensation Commission** is still going to be computed.

D. <u>Analysis</u>:

[12] **Rule 45A of the Uniform Rules of Court** provides as follows:

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

[13] In ***Erasmus v Sentraalwes Koőperasie Beperk***[1], **Wright J** held that in particular circumstances, the court could, in the determination of the factors to be taken into account in the exercise of its discretion under **Rule 45(A) of the Uniform Rules of Court,** borrow from the requirements for the granting of an interim interdict. The court went further and referred to the case of ***L F Boschoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd***[2] which states that the applicant must show:

> "(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;

[1] 1997 (4) ALL SA 303 (D) at 307; See also: Erasmus B1-330A
[2] 1969 (2) SA 256 (K) at 267

(b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief, and

(d) that the applicant has no other satisfactory remedy."

[14] It is common cause between the parties that the **Deed of Settlement** which was made an order of court constitutes a contract between the applicant and the respondent. Therefore there are rights and obligations flowing from it. It is undoubtedly so that the applicant has a right of recourse in contract against the respondent in the event that he suffers damages as a result of a breach of the contract by the respondent. That much, is admitted by the applicant. The applicant therefore, has an alternative remedy available to him.

[15] Primarily, the applicant withheld the money on the basis that there are potential claims for **VAT, SARS and Workmen's Compensation levies**. The evidence of the applicant and both accountants reveal **Umgamanzi's** liability in respect of these items could not be determined on the information received and that is why there has to be further investigations. The amount withheld is therefore arbitrary. The applicant withholds the money in order to secure a claim which cannot be determined at this stage. The respondent on the other hand needs the money to purchase a home in Johannesburg for her and their minor daughter. It would therefore be convenient to release the money to the respondent rather than withhold it.

[16] The applicant argues that the issues of convenience and prejudice favour him because the effect of the non-disclosure by the respondent does not only sound in money but relate to a breach of statutory precepts and places the acquisition of long term fishing rights and the value of **Umgamanzi** in serious jeopardy as alluded to. It seems to me that, that would constitute a valid reason for the applicant to sue the respondent for breach of contract and damages, more especially that the withheld amount cannot be said to represent the damages the applicant would have suffered for taking over a vessel which has no value.

[17] If the amount is released to the respondent, the applicant shall not suffer any prejudice or irreparable harm because the applicant can still recover the money from the respondent in an action in due course especially that the respondent owns an immovable property within the jurisdiction of this court.

[18] The general principles for the granting of a stay in execution where summarised as follows in ***Gois t/a Shakespeare's Pub v Van Zyl & Others***[3];

> "(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.

[3] 2011 (1) SA 148 (LC) at 155H-156B

(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, ie 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."

[19] The applicant shall not suffer any injustice if the amount is released to the respondent. As stated above, the applicant can still recover whatever loss he may suffer. In the instant matter the applicant is not attacking the *causa* for the order granted, like for example seeking the rescission of the judgment or order. In other words, the *causa* is not disputed.

I am of the view that the applicant has failed to make a case for the order sought.

Consequently, I make the following order:

(a) The application is dismissed with costs.

M MAKAULA

JUDGE OF THE HIGH COURT

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