



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2280/2020

In the matter between:

VINCEMUS INVESTMENTS (PT) LTD t/a
KEMPSTON FINANCE

(Reg. no.: 1969/004762/07)

Applicant

and

WILLEM ANDRIES MARITZ NEL

Respondent

CORAM: VAN ZYL, J

HEARD ON: 14 JULY 2022

DELIVERED ON: 14 OCTOBER 2022

[1] The applicant approached court on 14 July 2022 on an urgent basis for the following relief:

“1. That condonation be granted for the applicant’s non-compliance with the Uniform Rules of Court relating to

timeframes, service and forms; that it be dispensed of and that this application be heard on an basis in terms of the provisions of Uniform Rule 6(12).

2. That the execution of the writ of execution issued in respect of the respondent's interlocutory application under case number 2280/2020 be stayed pending the finalisation of the main application under case number 2280/2020."
3. That the respondent to pay the costs of this application."

[2] The application was opposed and the respondent filed an answering affidavit, in response to which the applicant filed a replying affidavit.

Common cause background:

- [3] The litigious history between the parties as set out in the founding affidavit filed in the present application, deposed to by the applicant's attorney of record, is common cause.
- [4] The applicant launched an application for the sequestration of the respondent's estate on or about 3 July 2020 ("the main application"). The claim of the applicant against the respondent is based thereon that the respondent bound himself as surety and co-principal debtor on behalf of a certain Prinsloo Familie Trust ("the Trust") in respect of a debt due to the applicant by the Trust for goods sold and delivered in terms of eight instalment sale agreements.

[5] According to an allegation in the founding affidavit in the present application the total amount due, owing and payable to the applicant on the aforesaid basis, is R45 271 146.77, plus interest and costs.

[6] In the alternative to seeking the sequestration of the respondent's estate in the main application, the applicant is seeking judgment in favour of the applicant against the respondent for payment of the amounts set out in the notice of motion filed in the main application, a copy of which is attached to the present application. In the said notice of motion, the amounts are set out as follows:

"4.1 That judgment be granted in favour of the applicant against the respondent for:

- 4.1.1 payment of the sum of R3 123 836.15;
- 4.1.2 payment of interest on the amount of R3 123 836.15 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;
- 4.1.3 payment of the sum of R2 132 850.77;
- 4.1.4 payment of interest on the amount of R2 132 850.77 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;
- 4.1.5 payment of the sum of R6 830 566.58;
- 4.1.6 payment of interest on the amount of R6 830 566.58 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;
- 4.1.7 payment of the sum of R6 830 566.58;
- 4.1.8 payment of interest on the amount of R6 830 566.58 at the prime lending rate minus 0,25% per annum

calculated from 22 February 2019 to date of payment, both days inclusive;

- 4.1.9 payment of the sum of R5 319 184.76;
- 4.1.10 payment of interest on the amount of R5 319 184.76 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;
- 4.1.11 payment of the sum of R6 655 572.01;
- 4.1.12 payment of interest on the amount of R6 655 572.01 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;
- 4.1.13 payment of the sum of R6 722 999.44;
- 4.1.14 payment of interest on the amount of R6 722 999.44 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;
- 4.1.15 payment of the sum of R6 655 570.48;
- 4.1.16 payment of interest on the amount of R6 655 570.48 at the prime lending rate minus 0,25% per annum calculated from 22 February 2019 to date of payment, both days inclusive;"

[7] The main application was opposed by the respondent. The respondent filed its answering affidavit, whereafter the applicant filed a replying affidavit.

[8] On 11 February 2021 the respondent launched an interlocutory application for the striking out of certain parts of the applicant's replying affidavit filed in the main application, which application was heard on 17 September 2021. The interlocutory application was successful and on 28 October

2021 it was ordered that the applicant was to pay the costs of the interlocutory application.

- [9] On 10 March 2022 the main application served before Naidoo, J, whereafter judgment was reserved.
- [10] The respondent's bill of costs for purposes of the interlocutory application was taxed on an opposed basis and on 29 June 2022 the Taxing Master issued its allocator in terms whereof the amount of R162 081.86 was taxed and allowed in favour of the respondent.
- [11] On 1 July 2022 the respondent's attorney of record addressed a letter to the applicant's attorney of record in which payment of the amount of R162 081.86 was demanded. It was further indicated that in the absence of payment before close of business on the said date, a writ of execution was to be issued against the applicant.
- [12] On 4 July 2022 the applicant's attorney of record responded to the aforesaid e-mail, a copy of which is attached to the founding affidavit as annexure "FA5". In paragraph 10.2 of the founding affidavit filed in the present application, the applicant's attorney of record stated that in the response e-mail he informed the respondent's attorney of record "*that the applicant intends setting off the taxed and allowed amount owed to the respondent against the claim amount alleged to be due and owing and payable by the respondent to the applicant in the main application.*" It was further stated in the e-mail that the issuing of a warrant of execution against the applicant in the circumstances would be

mala fide. In view thereof that the judgment in the main application was pending, an undertaking was also given that should the applicant not be successful in its claim against the respondent in the main action, payment of the allocated taxed amount would be made within 48 hours after the handing-down of the judgment.

[13] It was further stated in the founding affidavit that it came to the knowledge of the applicant's attorney of record on 8 July 2022 that a warrant of execution had in fact been issued and that it was therefore accepted that it would soon be executed.

[14] In the founding affidavit the applicant's attorney of record also referred to and attached e-mail correspondence which he addressed to the registrar of Naidoo, J in which he enquired with regard to when judgment might be expected to be delivered. On the basis thereof he stated in paragraph 11.5 of the founding affidavit that "I am respectfully of the view that judgment in the main application will be forthcoming soon and that there is consequently no prejudice to the respondent in the event that the writ of execution is stayed pending judgment in the main application".

[15] AS is evident, at the time when the present application was issued, judgment had not yet been handed down in the main application.

The basis of the present application:

[16] The alleged basis of the application is set out in paragraph 12 of the founding affidavit, which I deem necessary to repeat herein:

- “12.1 I respectfully submit that the writ of execution should be stayed until such time as judgment is handed down in the main application.
- 12.2 The applicant will suffer unnecessary damages in the event that its goods are attached and removed, as is clearly the intention of the respondent in the matter.
- 12.3 The undertaking has been given, and is repeated herein, that in the event that the applicant is not successful in the main application, payment of the amount for which the writ has been issued, will be made to the respondent within 48 hours of the judgment being received.
- 12.4 I respectfully submit that it is reasonably believed that the judgment will be forthcoming very soon and is likely to be received even prior to the Sheriff executing the writ of execution.
- 12.5 In the event that the writ is not stayed as prayed for in this application, the applicant has no guarantee that it will be able to successfully reclaim its damages suffered as a result of execution steps being taken especially in view thereof that it already has a claim in excess of R45 million pending against the respondent as is evident from the main application.
- 12.6 The applicant simply has no alternative remedy available to it but to approach the Honourable Court for the stay of the writ of execution as alluded to above in view thereof that the respondent and his attorneys are not amenable to consent to same being stayed pending judgment in the main application.

In the premises, it is submitted that a proper case has been made out for the relief sought and specifically, that there is no prejudice for the respondent if the writ is stayed in the circumstances.”

Urgency:

[17] Mr Zietsman, who appeared on behalf of the respondent, indicated at the commencement of the hearing of the application that the respondent, without making any concession regarding the merits of the application, does not oppose the granting of condonation in terms of prayer 1 of the notice of motion. I consequently granted such an order.

Merits of the application:

[18] The applicant is seeking an *interim* interdict pending the finalisation of the main application, more particularly, the handing down of the judgment therein.

[19] The requirements for an *interim* interdict are trite:

- “(a) A *prima facie* right;
- (b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (c) That the balance of convenience favours the granting of an interim interdict; and
- (d) That the applicant has no other satisfactory remedy.”

See **LAWSA**, Vol. 11, 2nd Edition, at para 403.

Prima facie right:

[20] The first requirement for an interim interdict is a *prima facie*

right, namely *prima facie* proof of facts that establish the existence of a right in terms of substantive law. In **National Gambling Board v Premier of KwaZulu-Natal and Others 2002 (2) BCLR 156 (CC)** at para [41] it was confirmed that an applicant for an interim interdict must show a *prima facie* right to the main relief pending which the interim interdict is sought. The test for such a *prima facie* right was set out in **Simon N.O. v Air Operations of Europe AB & Others** 1999 (1) SA 217 (SCA) at 228G – H to be the following:

“Insofar as the appellant also sought an interim interdict *pendente lite* it was incumbent upon him to establish, as one of the requirements for the relief sought, a *prima facie* right, even though open to some doubt (*Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189). The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed. (*Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688B-F and the numerous cases that have followed it.)”

Also see **Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont, and Another** 1996 (3) SA 706 (CPD) at 714G – H.

[21] — The *prima facie* right the applicant is relying on is that it intends applying set-off should it be successful with the main application.

[22] If it is, for the moment, to be accepted that the applicant will be entitled to apply set-off should it be successful with either the main relief or the alternative relief sought in the main application, the fact remains that the applicant needs to establish *prima facie*, even though open to some doubt, that it will be successful with the main application.

[23] In paragraph 5.3 of the founding affidavit it was stated that in an attempt to not unnecessary burden the papers in the present application, it will be arranged that the court file in respect of the main application, alternatively a copy thereof, be placed before the Presiding Judge in the present application, prior to the hearing thereof.

[24] In response to the aforesaid, the following was stated in paragraph 4.6 of the answering affidavit:

“... the applicant has referred the Honourable Court to the main application and contended that it will place the main application before the court who will hear this application on less than 4 (four) court days’ notice. The main application consists of 2217 pages and it is simply, with respect, impossible for the motion court (Judge) to study the main application papers and prepare for the motion court on such short notice. What makes it worse for the applicant is the fact that the applicant does not direct the Honourable Court’s attention to any particular aspect in the main application on which the applicant intends to rely. ...”

[25] In the replying affidavit the applicant’s attorney of record responded to the last-mentioned averments made on behalf of the respondent as follows:

"7.3 ... as the respondent takes no issue with the litigious history of the matter as set forth by the applicant in its founding affidavit, respectfully, it is submitted that the main application and particularly the reading thereof is unnecessary in the circumstances as it is not in dispute.

7.4 In any event, as is clear from the founding affidavit, the main application is sought to be placed before the Honourable Presiding Judge hearing this matter to prove that the main application exists, that it has been finally adjudicated and that judgment is pending – the merits of the main application for purposes of this application is in any event irrelevant and only the facts as stated aforesaid, bears relevance and are not in dispute as the respondent has admitted same in its opposing affidavit filed. ..."

[26] It is important to be mindful of the fact that although the respondent did not dispute the litigious history set out in the founding affidavit, he did not concede the merits of the main application.

[27] The main application was at no stage placed before me. In any event, even if it had been placed before me, the respondent is correct in his contention that the applicant would in any event not have been entitled to rely on any aspect thereof without having incorporated same in the present application.

[28] The applicant consequently completely failed to make any allegation whatsoever regarding or in support of its *prima facie* chances of being successful with either the main relief or the alternative relief sought in the main application.

[29] In order to successfully apply set-off, the requirements thereof must be alleged and proved. In Amler's Precedents of Pleadings, L.T.C. Harms, the learned author states the following with reference to applicable case law:

"To rely on set-off, the defendant must allege and prove

- (a) the indebtedness of the plaintiff to the defendant;
- (b) that the plaintiff's debt to the defendant is due and payable;
- (c) that both debts are liquidated;
- (d) that the parties are indebted to each other in the same capacity."

[30] Other than the averment in the founding affidavit that the debt due by the Trust to the applicant, for which the respondent is allegedly responsible as surety and co-principal debtor, is with regard to "goods sold and delivered", there is no specific allegation and/or proof that it is a liquidated debt. Even if it is to be accepted for purposes of this application that the alleged debt is indeed liquidated on the basis that an averment of "goods sold and delivered" is generally accepted to be a reference to a liquidated amount, there are no allegations which constitute prima facie proof that the said debt is "due and payable" by the respondent to the applicant. On the applicant's own version, as stated in the e-mail of 4 July 2022 attached to the founding affidavit as annexure "FA5", to which e-mail I already referred to earlier, it is evident that this requirement is in dispute. In this regard the applicant's attorney of record specifically stated as follows:

“Verder, en sou dit later blyk dat u kliënt as borg onthef is (wat ons kliënt steeds ontken) onderneem ons kliënt om die betaling te maak binne 48 uur vanaf die datum waarop die uitspraak ter hand gekom het wat bevestig dat u kliënt inderdaad as borg onthef is.”

[31] Without even considering the other requirements for purposes of successfully relying on set-off, it is evident that the applicant will only be entitled to rely on and apply set-off once the court adjudicating the main application finds that the alleged debt is in fact due and payable by the respondent to the applicant.

[32] It was consequently essential for the applicant to have dealt with the merits of the main application with regard to this aspect in order to have established a *prima facie* right, though open to some doubt. Having failed to do so, I deem it unnecessary to consider whether the applicant made out a proper case with regard to the other requirements for set-off.

[33] Similarly, having failed to allege and prove a *prima facie* right for purposes of establishing an *interim* interdict, I deem it unnecessary to determine whether the applicant made out a proper case for purposes of the other requirements of an *interim* interdict.

[34] The aforesaid findings pertain to both the main and the alternative relief sought in the main application.

[35] The application consequently stands to be dismissed.

Costs:

- [36] In the answering affidavit it is requested that the application be dismissed with costs on a punitive scale. In support of this contention, the respondent's attorney of record stated on behalf of the respondent that the applicant's intention of placing the main application before me in the circumstances of this matter constituted an abuse of court process.
- [37] I have already indicated what the response of the applicant's attorney was to the aforesaid allegation and that the main application was subsequently not placed before me. This aspect has consequently fallen away as a possible basis for a punitive costs order.
- [38] It was further contended in the answering affidavit that "the applicant, through its attorney, Noordman, has clearly pressurised the Honourable Justice Naidoo to deliver a judgment simply because it wants to avoid payment of a monitory judgment of this Court." Although it is correct that the enquiry was made to the registrar of Naidoo, J, it was the applicant's attorney himself who revealed same in the founding affidavit. He did not attempt to or consider it necessary to hide the communication. This factor, as well as the wording of the enquiry directed at the said registrar, are in my view cannot in my view be considered to not indicative of an attempt to have pressurised Naidoo, J.
- [39] Although the institution of this application was, in my view, ill-conceived and/or ill-advised, that, in itself, does not constitute
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a basis for a punitive costs order and is not necessarily indicative of an abuse of court process.

[40] There is, however, no reason why costs should not follow the outcome of the application.

Order:

[41] The following order is made:

1. The application is dismissed with costs.



C. VAN ZYL, J

On behalf of the applicant: Adv. R Bester
Instructed by:
Noordmans Inc
BLOEMFONTEIN

On behalf of the respondent: Adv. PJJ Zietsman SC
Instructed by:
Muller Gonsior Inc
BLOEMFONTEIN