**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: 917/2014

In the matter between:

**KIRF JOHL CC** Applicant

and

**ANETTE LABUSCHAGNE** 1st Respondent

**THE SHERIFF OF THE COURT, FAURESMITH** 2nd Respondent

---

**IN RE**

Case number 917/2014

**FREDERICK WILLEM COENRAAD LABUSCHAGNE** Applicant

and

**ANETTE LABUSCHAGNE** 1st Respondent

**JOHANNES CORNELIUS LABUSCHAGNE** 2nd Respondent

**RINETTE LABUSCHAGNE** 3rd Respondent

**KIRF JOHL CC** 4th Respondent

---

**HEARD ON:** 03 NOVEMBER 2016

---

**JUDGMENT BY:** MATHEBULA, J

---

**DELIVERED ON:** 20 APRIL 2017

---

[1] The Applicant seeks the following orders on notice of motion. They read as follows:-

1. **An order setting aside the Warrant of execution (attached hereto marked as Annexure "A").**
2. **The First Respondent be ordered to pay costs of this application on a party and party scale, and in the event that the First Respondent elects to oppose the application, on a scale as between attorney and client.**
3. **Further and/or alternative relief.**

[2] The application is vehemently opposed by the First Respondent who is the erstwhile member of the Kirf Johl CC.

[3] On the 6th November 2014 my sister Mbhele AJ (**as she then was**) handed down an order that the Applicant pay the purchase price of the member's interest belonging to the First Respondent within **thirty (30)** days of the submission of the Valuation Report. The Valuation Report compiled by Daan Havenga dated **2nd November 2015** calculated the fair market value of that member's interest to be **R1 266 310,00**. There seem to be no dispute between the parties on this aspect as both utilize the figure as the benchmark for different reasons.

[4] The Applicant paid over the sum of **R108 012,32** to the First Respondent's attorneys on the basis that the sum of **R1 132 297,68** has been set-off as the amount of money misappropriated by the First Respondent during the period that she was in control of the administration and financial affairs of the Kirf Johl CC. The First Respondent caused a Writ of Execution to be issued by the Registrar of this Court for the amount that the Applicant has deducted which is the subject of this application. The parties are embroiled in an

acrimonious divorce. This is indicative in the countless applications and counter applications in this Court and other divisions. This is also the observation of Mbhele AJ **(as she then was)** in her judgement that the relationship between the members of the Kirf Johl CC has reached its lowest ebb to **"a level wherein parties cannot exist together within the Fourth Respondent".**

[5] It was submitted on behalf of the Applicant that substantial evidence has been provided to conclude that it was just and proper to apply a set-off in this regard. In essence, a *prima facie* case has been made to support that proposition. Further that the concept **"set-off"** draws its strength and effect through the law and not any act or deed. In addition that irreparable harm may result should the execution not be stayed and the Applicant succeed in establishing the set-off. This will be so particularly in situations where the underlying *causa* may be removed.

[6] On behalf of the respondent it was contended that the applicant is approaching the court for a final not an interim relief. The submission was that the court should not be concerned with the merits of the underlying dispute but the enquiry be limited to whether the *causa* is in dispute. The correct approach should be the application of the principles of an interim interdict. The applicant was in this regard engaging in self help and conveniently ignoring the Order of the court per Mbhele AJ with unfounded **"theft"** allegations which have not been pronounced upon by any court. Thus the application should be dismissed with costs.

[7] The crux of the applicant's submission is that the set-off draws its strength and effort from the law and not any act or deed. Set-off occurs automatically by operation of law. **See Southern Cape Liquors (Pty) Ltd v Delipous Bellings Bpk 1998 (4) SA 494 C and Standard Bank Ltd v Echo Petroleum CC 2012 (5) SA 283 (SCA).** In this matter the applicant contend that he has demonstrated the existence of the case in favour of the set-off. It must be noted that no action has been instituted over a period of more than **two (2)** years against the First Respondent in this regard.

[8] I was referred to **Postmaster General v Taute 1905 T.S. 582 at 590** where the **Innes C.S.** said the following:- **"Set-off like payment, should be pleaded and proved, so that the Court may give effect to it"**. It was submitted on behalf of the First Responded that the Applicant randomly on its own accord applied the so-called **"set-off"** without any Court pronouncing on it. I respectfully agree with these views.

[9] The applicant in this matter is not applying for an interim order but a final order. The crime of the "theft" of any monies by the First Respondent was first alleged in the papers supporting the application before Mbhele AJ. Even at that stage it was unquantified and she did not pronounce on it. I am also not called upon to pronounce on it. It remains just that, an allegation. The irreparable harm anticipated has also not materialised despite the lapse of an substantial period of time. It appears that the Applicant simply chooses not to adhere to the Order of the Court or if he does, do so on his own terms and conditions. That will be an absurdity if that is permitted to prevail.

[10] The approach to court should be that of suspending the Warrant of Execution pending the finalization of the theft claim. In that event the sole enquiry will be whether the *causa* is in dispute or not. In this matter the applicant does not dispute the *causa*. See **Gois v Van Zyl 2011 (1) SA 148 (LC)** It stand to reason that the Applicant simply intend evading complying with the Court Order. Accordingly I am of the view that this application must be dismissed.

[11] The conduct of the Applicant in electing to flaunt the Court Order must be frowned upon and be discouraged. It is my view that the application was both frivolous and vexatious when the Court Order that had to be complied with was clear and comprehensive on what should occur once the determination of the members' interest belonging to the First Respondent had been compiled by the appropriate expert. I could find no reason to deviate from the rule that the unsuccessful party should pay the costs. In order to demonstrate the displeasure about the conduct of the Applicant, a much higher scale of costs should be awarded against such a party.

[12] I make the following order.

1. The application is dismissed.
2. The Applicant is ordered to pay the costs on a attorney and client scale.

**MATHEBULA, J**

| | |
|---|---|
| On behalf of applicant: | Adv. S D Wagener SC |
| Instructed by: | Symington & De Kok |
| On behalf of respondents: | Adv. S Reinders |
| Instructed by: | Honey Attorneys |

/roosthuizen