IN THE HIGH COURT SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 19/8/15

CASE NO: 31960/2010

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.
(3) REVISED.
DATE 14/8/15 SIGNATURE

In the matter between:

GERHARDUS FRANCOIS ROSSOUW N.O (in his capacity as Trustee of the SJP Family Trust)	First Applicant
ESTELLE KATHLEEN VAN DER MERWE N.O. (in her capacity as Trustee of the SJP Family Trust)	Second Applicant

And

LAND-AND AGRICULTURAL BANK OF SOUTH AFRICA	First Respondent
THE SHERIFF MOOKGOPHONG	Second Respondent

JUDGMENT

TOKOTA AJ

[1] This is an application in terms of Rule 30 of the Uniform Rules of court wherein the applicants seek an order setting aside a warrant of execution dated 18 September 2013 (which was issued by the first respondent pursuant to a judgment in its favour) as an irregular step.

[2] I have been referred to the Supreme Court of Appeal decision in Rossouw N.O v Land and Agricultural Development Bank of South Africa (794/12) (2013) ZA SCA 016 from which the subject matter of issuing the warrant of execution flow. I have had the benefit of reading that case. For proper perspective of this matter it is necessary to summarise hereunder the background events that took place prior to the issuing of the warrant. To the extent that the facts of the case are relevant in this matter they may be summarised as follows:

[3] On 2 September 2004 the first respondent (the Bank) concluded an instalment sale agreement with the SJP Family Trust (the Trust) duly represented by its trustees, the applicants, in terms whereof the bank lent and advanced monies to the Trust for the purchase of irrigation equipment known as pivots which were to be purchased from the supplier Andrag Agrico (Pty) Ltd (Andrag).

[4] Pursuant to the conclusion of the agreement the Bank advanced a sum of R2 716 737.55 to the Trust for the purchase of irrigation equipment, including ten pivots. In essence therefore these pivots were purchased by the Bank from Andrag for on-sale to the Trust. The written agreement of sale between the Bank and Andrag stipulated that payment of the purchase price was conditional upon the Bank being furnished with two written declarations, one on behalf of the Trust and the other by an Andrag's technician.

[5] The declarations had to confirm that the said pivots had been delivered to the Trust, installed and were fully operational. The declarations were furnished to Bank and were purportedly signed on 16 November 2004 by Mr Paul van den Berg, the Andrag's technician, and by Mr Cornelis van

der Merwe on behalf of the Trust. Van den Berg handed the signed declarations to the Bank on the date of their purported signature, whereupon the Bank paid the full purchase price of ten pivots to Andrag. Unbeknown to the Bank only six pivots, instead of ten as indicated in the declarations, were delivered. In the installment sale agreement between the Bank and the Trust, the Bank had reserved ownership of the pivots until the purchase price had been paid in full by the Trust.

[6] Notwithstanding the agreement the Trust never made any payments. This resulted in the Bank instituting vindicatory proceedings in this court with an alternative claim in terms of the *action ad exhibendum* in respect of ten pivots. The pivots were valued at R1 710.00 each. This court ordered the Trust to pay to the Bank a sum of R1 710 000.00 being the price of the ten pivots. The Trust then appealed to the Supreme Court of Appeal against the order.

[7] The appeal was partially successful and the Supreme Court of Appeal set aside the order of this Court and substituted it with an order that the Trust should pay the Bank the sum of R1 026 000 plus interest thereon

calculated at the rate of 15, 5 % per annum from 22 June 2010. The appeal to the Constitutional court was unsuccessful.

[8] The Bank, in an attempt to enforce the judgment in its favour, caused a warrant of execution, which is the subject of this application, to be issued.

[9] In the meantime the parties were involved in another litigation wherein the Trust was suing the Bank for damages in an amount in excess of R22 million. The Trust then brought an application interdicting and restraining the Bank from taking any steps in execution of the judgment until the finalisation of the damages claim. The idea was that if the Trust was successful in its claim the amount owed to the Bank would be set off. On 11 August 2014 the application was dismissed with costs by Bam J. An application for leave to appeal was dismissed.

[10] After exchange of correspondence between legal representatives of the parties with regard to the interpretation of section 18 of the Superior Court Act No.10 of 2013 (the Act) the Bank caused the warrant of execution to be issued.

[11] The Trust then issued a Rule 30 notice alleging that the issuing of the warrant of execution constituted an irregular or improper step alleging that it was in conflict with the provisions of section 18(1) of the Act. In the present application I am therefore called upon to determine whether or not the step taken by the Bank constituted an irregular step. If I find that such action constituted an irregular step as envisaged in Rule 30 I must set it aside.

[12] Mr Muller SC appeared for the applicants and Mr N Kades SC together with Mr P L Uys appeared for the Bank.

[13] At the commencement of the hearing Mr Kades argued a point in limine that these proceedings have become of academic interest. He contended that the trial date (which was 28 January 2015) in the damages claim between the parties has come and gone. He contended that I should dismiss the application on that ground alone. Naturally this was opposed. I ruled that I was not inclined to decide this matter only on that basis and that the determination of the point in limine should be decided at the end of the case and therefore merits should be argued.

[14] I deem it expedient to dispose of the point in limine first. I am of the view that the application for suspension of the order pending the finalisation of the damages claim was intended to mean the final conclusion of the matter. I was informed by Mr Muller from the bar that on 28 January 2015 the matter was postponed. Consequently the matter has not yet been finalised. In the light of the view I take the point in limine cannot succeed.

[15] As I understood the argument of Mr Muller his contnention was that the order of Bam J was final in effect and not susceptible for alteration by him. Therefore section 18(1) of the Act applies. He argued that the purpose of section 18(1) is to suspend the operation of the order appealed against so as to prevent irreparable harm. In his view the order of the Supreme Court of Appeal is the subject matter of appeal as envisaged in section 18(1) of the Act. Consequently the application for leave to appeal had the effect of suspending that order. Accordingly, so he argued, the issuing of a warrant of execution in terms of the Rules in the face of the provisions of section 18(1) constituted an irregular step.

[16] Section 18(1) provides: "(1) *Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the*

operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is *suspended pending the decision of the application or appeal."* In the light of the view I take of the matter it is not necessary to analyse the provisions of section 18 in any detail. Mr Kades argued that the provisions of section 18(1) were not applicable in this matter simply because the order of the Supreme Court of Appeal was not the subject matter of appeal. He argued that the application for leave to appeal against the order of Bam J restored the parties' position prior to the issuing of the warrant and therefore the Bank was entitled to give effect to the order of the Supreme Court of Appeal.

[17] In what follows hereunder I examine the provisions of Rule 30 and test whether section 18(1) of the Act applies. If it is applicable to determine whether, on the facts of this case, the application for leave to appeal forms the subject matter of the issues between the parties.

[18] Rule 30 provides:

"Irregular Proceedings

(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;

(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.

(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order."

[19] The 'cause' between the parties was an application for the stay of the execution of the judgment of the Supreme Court of Appeal pending the finalisation of a damages claim. The initial cause which led to the issuing of the warrant was a claim for payment of monies lent and advanced to the Trust. In this regard the Bank obtained judgment in its favour. That judgment is final in that the highest court of this land has sealed it as correct. There is no possibility of it being set aside at any future date. The Bank is therefore entitled to execute it. The issue of a warrant of execution is but one of the forms of enforcing the judgment.

[20] In considering whether or not the step taken by the Bank was irregular as envisaged in Rule 30 it is necessary to determine whether the Rule applies to a situation such as the present matter as well. The purpose of the Rule, as I see it, is to regulate the procedure in litigation matters in accordance with the Uniform Rules of Court in relation to "a cause" between the parties. To interpret Rule 30 as allowing a party to invoke its provisions even in matters not regulated by the Rules would be casting a net too broadly. Further to interpret the Rule to apply to a situation where the 'cause' for the step taken, as in this case, has already been determined by court would be to create a catch for all situation. I do not think that was the intention of the Rule.

[21] In my view Rule 30 applies where a party to a cause ought to have taken an alternative step in terms of the Uniform Rules, for example, where a replying affidavit has been filed out of time without applying for condonation for the late filing thereof. It is the failure to file within the time period prescribed by the Rules which constitutes an irregular or improper step. Even in such situations the court has a discretion to condone the failure to comply with procedural steps prescribed by the Rules.

[22] The Rules are made for courts to facilitate the adjudication of cases; hence courts enjoy the power to regulate their own processes, taking into account the interests of justice. If it is in the interest of justice the court has a right to depart from its own Rules. .In order to attain justice Rules are to be interpreted in a flexible manner. Furthermore the present judicial trend is to condone an irregularity rather than to visit it with a nullity especially where the complaining party will not suffer prejudice. It has been held that "*technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.*"[1]

[23] **In Mukaddam v Pioneer Foods (Pty) Ltd 2013 (5) SA 89 (CC) p.99 para 32** the Learned Judge of the Constructional Court, Jafta J said:

> "[32] *It is important that the rules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice. But sometimes circumstances arise*

[1] See Trans-African Ins Co Ltd v Maluleka 1956 (2) SA 273 (A) at 278F-G

which are not provided for in the rules. The proper course in those circumstances is to approach the court itself for guidance. After all, in terms of s 173 each superior court is the master of its process.'[2]

[24] The rhetorical question in this matter is which step should a successful party take in order to enforce the judgment other than issuing a warrant of execution in the event of a failure to pay by a loosing party? In my view the step which was taken by the Bank cannot be classified as improper or irregular. On this ground alone the application ought to fail.

[25] There is of course another dimension of the case. Rule 30 is intended to regulate the parties' conduct during the process of civil litigation in order to facilitate adjudication of the issues between the parties. Once litigation is finalised the parties must give effect to the judgment of the court. Technical objections aimed at frustrating such judgment of the court should not be allowed. On this ground as well, in the exercise of my discretion I would still dismiss the application.

---

[2] See epublikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 783A – B; Chelsea Estates & Contractors CC v Speed-O-Rama 1993 (1) SA 198 (SE) at 201G; Erasmus op cit B1-5; Harms op cit A2.3.' Standard Bank of SA Ltd v Dawood 2012 (6) SA 151 (WCC) para 12.; Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another 2014 (2) SA 119 (WCC)

[26] Furthermore I have reservations as to whether the Rule was intended to cover a situation where the cause of the complaint emanates from legislation. Bava AJ said that. (r)*ule 30 was meant to deal with irregular steps taken by parties involved in litigation where the irregularity emanated from the use of the Rules of Court.*[3] I agree.

[27] In any event even if Rule 30 applies to legislation I would, as indicated above, in the exercise of my discretion, still dismiss the application.

[28] The general rule is that costs should follow the event. I see no reason why the rule should not apply in this case. Senior Counsel were employed on both sides which is an indication that both parties saw it fit that the matter warranted their employment.

[29] Although the matter may appear simple, I asked both Counsel if there is any judicial precedent to which I can refer, they both could not refer me to any decided case covering the facts of this matter. I was also unable to find relevant authority. The Bank considerd it a wise and reasonable

[3] See Cochrane v City of Johannesburg 2011 (1) SA 553 (GSJ) para 31

precaution to employ two counsel. It cannot be faulted. In the result I make the following order.

1. The application is dismissed

2. The applicants are ordered to pay costs including costs consequent upon employment of two Counsel.

BR TOKOTA
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:	29 JULY 2015
DATE OF JUDGMENT:	
For the applicants:	Adv G CMuller SC
Instructed by:	Jacques van der Merwe Attorneys
For the First Respondent:	Adv N Kades SC & Adv P L Uys
Instructed by:	Geldenhuys Maltji Inc