

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Case number: **219 / 2013**
Date heard: **31 / 05 / 2013**
Date delivered: **14 / 06 / 2013**

In the matter between:

ANDRIES PIETERS

Applicant

and

HENDRIK KLAASTEN

1st Respondent

SHERIFF OF VICTORIA WEST

2nd Respondent

Coram: Erasmus, AJ

JUDGMENT

ERASMUS, AJ

[1] The applicant lodged an urgent application on 8 February 2013 for an order interdicting the respondent from disposing of a Toyota Hilux with registration number BFV 057 NC and VIN number AN563003672 ('the vehicle'). The applicant also seeks a cost order against the respondents.

[2] The background to this application appears to be common cause between the parties.

[2.1] Judgment was granted against the son of the applicant, Nico Jansen ('the judgment debtor') on 30 August 2010, in the Magistrate's Court Victoria West under case number 164/2009. The plaintiff in that action is the first respondent in this application. A warrant for execution was issued on 19 August 2011. On 03 May 2012 the second respondent attached the vehicle and 10 sheep at the judgment debtor's home.

[2.2] On 05 June 2012 the applicant's attorney informed the second respondent that the applicant is the owner of the vehicle and attached an affidavit of the applicant in support of this claim. He requested the second respondent to commence interpleader proceedings. In this affidavit, deposed to by the applicant on 04 June 2012, he alleged that he is the owner of a Toyota Hilux with registration number BFV 059 NC and VIN number LN563003677. These numbers differ from those of the vehicle referred to in the notice of motion and the vehicle that was attached by the second respondent.

- [2.3] The second respondent filed an interpleader notice which was served on the first respondent on 08 August 2012. The first respondent opposed the applicant's claim. The adjudication of the interpleader proceedings commenced on 19 September 2012 and was finalized on 09 January 2013. The applicant's claim to the vehicle was dismissed on that day.
- [2.4] The first respondent proceeded to advertise the sale in execution to take place on 8 February 2013. The applicant saw the advertisement on 18 January 2013. His attorneys contacted the second respondent on 01 February 2013. The second respondent contacted the applicant on 5 February 2013, informing him that the sale in execution would proceed on 08 February 2013. Neither the applicant or his attorney, nor the second respondent contacted the first respondent's attorney between 18 January 2013 and 08 February 2013.
- [2.5] The applicant's attorney only phoned the first respondent's attorney on 08 February 2013, informing him that they intend lodging an

application for the stay of the sale in execution. The first respondent's attorney responded in writing on 08 February 2013, informing the applicant's attorney that the applicant's claim was dismissed on 09 January 2013 and that the applicant did not appeal against that decision and that the sale in execution would proceed unless he is presented with a court order directing otherwise.

[2.6] The applicant proceeded to lodge this application on 8 February 2013. The papers were served on the first respondent's attorney by means of facsimile transmission. The second respondent provided an undertaking not to proceed with the sale in execution and the application was postponed. The first respondent filed opposing papers and the applicant filed a replying affidavit.

[2.7] The first respondent's attorney attached to the opposing affidavit, filed on 14 February 2013, the warrant of execution, notice of attachment and return of the second respondent, the letter by the applicant's attorney informing the second respondent of the applicant's claim to the attached

vehicle and the applicant's affidavit in support of the claim.

[3] During the adjudication of the interpleader proceedings on 19 September 2012, the applicant submitted documents in support of his claim which referred to registration and VIN numbers which differed from those referred to in his affidavit of 04 June 2012. The proceedings were postponed to 09 January 2013.

[4] On 09 January 2013 the applicant presented a registration certificate in respect of vehicle with registration number BVF 057 NC (the vehicle) and VIN number LN563003672. It appeared from this document that this vehicle was registered in his name on 19 October 2012. The magistrate dismissed the applicant's claim on 09 January 2013. It only became clear that the vehicle that had been attached was actually registered in the applicant's name on 19 September 2012, when the replying affidavit and annexures 'A1' – 'A7' were filed,

[5] It is alleged in the opposing affidavit, filed on behalf of the first respondent, that the interpleader proceedings were

postponed on 19 September 2013 on request of the applicant. On that day he informed the court that the vehicle was not registered in his name. The reason for the postponement was to enable the applicant to provide proof of his ownership and present proof that he purchased the vehicle on 09 January 2013.

- [6] The applicant alleges that he again produced his registration documents on 09 January 2013, but the Magistrate, Victoria West, refused to consider these and rejected his evidence unfairly and without granting reasons. He was not given an outcome of the hearing. The first respondent disputes these allegations and states that the magistrate gave reasons for the dismissal of the claim in the presence of all persons present at the proceedings.
- [7] In his founding affidavit the applicant attached, as annexure AP1, a document to which he referred to as the registration documents, as proof of his ownership of the vehicle. This document is not the registration papers, but a document reflecting the particulars of the vehicle and the fact that a licence was issued on 19 October 2012. The document does not reflect who the owner is, but it appears to be addressed to A Pieters, Jansenville 301, Britstown. The particulars of the vehicle referred to therein correspond with those of attached vehicle. The VIN number differs from that of the

vehicle referred to in the notice of motion. I accept though that this difference is due to a *bona fide* error.

- [8] The applicant denies that his son, the judgment debtor, was ever the owner of the vehicle. To his replying affidavit the applicant attached, as annexures 'A1' to 'A7', the Enatis resport of 'Motor Vehicles all Owners Query' in respect of the vehicle. This report appears to have been generated on 20 February 2013. From this report it appears that the previous owner(s) of the vehicle was/were DE AAR MEULE (Pty) Ltd and JA van der Bijl. The current owner appears to be the applicant and the ownership date is stated as 19 September 2012.
- [9] The applicant stated in his founding affidavit, deposed to on 8 February 2013, that it is his intention to appeal the order, if any, that was granted by the magistrate in the interpleader proceedings and that his attorneys 'are instructed to proceed with taking of the necessary steps to initiate the necessary process for lodgment of an appeal'. He further stated that his attorneys have already requested the necessary documents from the clerk of the court and refers to annexure 'AP 3'. This a letter by his attorneys in Kimberley, dated 6 February 2013, in which the 'interpleader' and judgment were requested from the clerk of the court. The summons in terms of section 69(1) of Act

32 of 1944 (interpleader) and, what appears to be a record of proceedings of 09 January 2013, were attached to his founding affidavit. It appears from these documents that the applicant's claim to the vehicle was dismissed on 09 January 2013. There is no further reference in the papers to the appeal, save for these averments.

[10] From the applicant's founding affidavit it appears as if he seeks relief in the form of an interlocutory interdict. He requests the suspension of the warrant of execution as a temporary protective measure pending the appeal of the outcome of the interpleader proceedings. The relief sought in the notice of motion is for an order interdicting the respondent from disposing of the vehicle and thus a final interdict. During argument at the hearing of the application on 31 May 2013, counsel for the applicant sought an amendment to the notice of motion. Counsel for the first respondent objected to the proposed amendment. After hearing argument from both parties the application for the amendment was refused. I do not deem it necessary to deal with the reasons for the refusal of amendment as the refusal will have no bearing on the outcome of the application, as will appear from the reasoning below.

[11] The requirements for a final interdict are set out in *Setlogelo v Setlogelo*¹, which is to this day the leading case on the requirements for a final interdict. The applicant must establish a clear right, a threat to breach such right (in the case of a prohibitory interdict) and that he has no alternative remedy.

[12] In respect of an interlocutory interdict, the applicant needs only to establish a *prima facie* right and, provided certain other requirements are met. In addition thereto, the applicant needs to establish a well grounded apprehension of irreparable harm if interim protection is not afforded, that the balance of convenience favours him and that he has no other adequate remedy.²

[13] The interlocutory interdict is a provisional order designed to protect the rights of the complaining party pending an action or application to be brought by him to establish the respective rights of the parties.³ It enforces the *prima facie* right for a period of time, at the end of which a clear right must still be proved and, failing which, the interlocutory interdict will be discharged. The granting or refusal of an

¹ 1914 AD 221; V&A Waterfront Properties (Pty) Ltd v Helicopter and Marine Services (Pty) Ltd 2006 (1) SA 252 (SCA)

² Webster v Mitchell 1948 (1) SA 1186 (A) at 1189; Gool v Minister of Justice 1955 (2) SA 682 (C) at 688D-E.

³ Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban 1986 (2) SA 663 (A) at 681D-F

interlocutory interdict lies in the exercise of judicial discretion by the court. In exercising this discretion, the court must take account of the balance of convenience in relation to both the applicant and the respondent and also any potential prejudice to third parties.

[14] The proper approach of a court when considering whether an applicant has established a *prima facie* right, is to take into account the applicant's prospects of success in relation to whether or not it is likely that the applicant will ultimately be able to show a clear right. This entails that the applicant must persuade the court that the facts set out by the applicant, together with the facts set out by the respondent which the applicant cannot dispute and taking into account the inherent probabilities, will entitle him to the final relief. The facts set out by the respondent, in contradiction, must then be considered. If the applicant's case is open to serious doubt, he cannot obtain the relief.⁴ The legal position was summarized by Ogilvie Thompson J in *Gool v Minister of Justice*⁵

"In my view the criterion on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial."

⁴ Webster *supra* at 1189

⁵ *Supra* at 688D-E

[15] *In casu*, this means that the applicant must show, on his own or admitted facts, that there is a reasonable prospect that will be successful on appeal. Integral to the considerations for granting the interlocutory interdict, is whether the applicant had shown that proceedings which address the principal dispute between the parties (that is the appeal), are intended or pending.⁶

[16] The applicant has neither proved a clear right, nor has he proved a *prima facie* right, which entitles him to final or interlocutory relief in this matter.

[16.1] The applicant was neither in possession of the vehicle when it was attached, nor was he the owner of the vehicle at the time. He only became the owner of the vehicle long after the judgment and attachment.

[16.2] There is no confirmatory affidavit in respect of the ownership of the vehicle by the applicant's son who is the judgment debtor and in whose possession the vehicle was when it was attached. No such evidence was presented during the interpleader proceedings.

⁶ *Saidex v The Minister of Minerals and Energy* (49/10) [2011] ZASCA 102 (1 June 2011) par [7]

- [16.3] There is no confirmatory affidavit of the previous owner or contract in respect of the sale of the vehicle to the applicant. No such evidence was presented during the interpleader proceedings, despite the applicant having been granted a postponement to obtain such evidence.
- [16.4] From the registration and/or licence document, as well as the eNatis-report, the applicant only became the owner of the vehicle, at best for the applicant, on 19 September 2012. That is more than two years after the judgment date, more than four months after the vehicle was attached and more than three months after the applicant informed the second respondent of his alleged claim to the vehicle.
- [16.5] The applicant's claim to the vehicle was considered and dismissed in the Magistrate's Court, Victoria West. The second respondent has a judgment in his favour, which has not been overturned. The applicant has not shown a prospect of success on appeal and/or that the magistrate's dismissal of his claim in the interpleader proceedings will be set aside.

[16.6] The applicant has failed to show that the appeal has been noted, prosecuted and that it is pending. The time periods prescribed in respect of civil appeals from the lower courts have lapsed.

[16.6.1] Rule 51 of the rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa, regulates appeals in civil cases and sub-rule (1) to (4) read as follows:

"(1) Upon a request in writing by any party within 10 days after judgment and before noting an appeal the judicial officer shall within 15 days hand to the registrar or clerk of the court a judgment in writing which shall become part of the record showing —

- (a) the facts he or she found to be proved; and*
- (b) his or her reasons for judgment.*

(2) The registrar or clerk of the court shall on receipt from the judicial officer of a judgment in writing supply to the party applying therefor a copy of such judgment and shall endorse on the original minutes of record the date on which the copy of such judgment was so supplied.

(3) An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer.

(4) An appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondent's costs of appeal to the amount of R1 000: Provided that no security shall be

required from the State or, unless the court of appeal otherwise orders, from a person to whom legal aid is rendered by a statutorily established legal aid board."

[16.6.2] Rule 50 of the Uniform Court Rules regulates civil appeals from magistrates' courts and sub-rule (1) reads as follows:

"(1) An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed."

[16.7] As appears from paragraph [16.6] *supra*, the applicant has not complied with the court rules in any respect. Even if the applicant now intends proceeding with an appeal, he will have to apply for condonation for the non-compliance with the rules. He will have to show that he has a reasonable prospect of success on appeal. Given the long delay and the facts of this matter, I am of the view that there are no such prospects.

[17] The first respondent's claim and the execution process have been delayed for a long period of time. It is in the interest of justice and in the interest of the first respondent that the law takes its course and the matter be finalized.

[18] It was not submitted that the costs should not follow the outcome of the proceedings. There is no reason why the

general principal in this regard should not be followed. I make the following order:

THE APPLICATION IS DISMISSED WITH COSTS.

**SL ERASMUS
ACTING JUDGE
NORTHERN CAPE DIVISION**

<u>For the Applicant:</u>	Adv Jankowitz Mjila & Partners, Kimberley
<u>For the First Respondent:</u>	Adv Stanton Engelsman Magabane Inc, Kimberley