

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 1789/2008

In the matter between:-

IMPACT DISTRIBUTORS (PROPRIETY) LTD t/a
BANDINI CHEESE

Applicant

and

PETRUS WILHELMUS JANSE VAN RENSBURG

1st Respondent

THE SHERIFF OF THE MAGISTRATE'S COURT
ROODEPOORT SOUTH

2nd Respondent

HEARD ON:

8 MAY 2008

JUDGMENT BY:

HANCKE J

DELIVERED ON:

15 MAY 2008

[1] This is an application for an interdict restraining the respondents from executing a warrant obtained by the first respondent pursuant to a judgment granted against the applicant in the Magistrate's Court of the district of Lindley held at Steynsrus on 28 January 2008, pending

1. the outcome of the appeal noted against the judgment under case number 68/2002;

2. the outcome of a condonation application for the late noting of the appeal, which condonation application is to be heard simultaneously with the appeal; and further
3. subject thereto that the said condonation application be served and filed within 15 days of the granting of this order.

[2] On 28 January 2008 the magistrate granted judgment against the applicant in the Magistrate's Court action for payment of the amount R7 433,60 plus interest at a rate of 15,5% p.a. from 9 September 2002 to date of payment as well as the first respondent's costs. Eventually, the warrant of execution was issued for a total amount of R50 380,18.

[3] On 6 March 2008 the applicant filed a notice of appeal and security. Despite the notice of appeal attorney Van Wyk, acting on behalf of the first respondent, instructed the second respondent to proceed with the warrant of execution. Apparently it was attorney Van Wyk's attitude that the applicant's notice of appeal was not filed according to the rules of court and therefore the noting of the appeal did not suspend the execution of judgment. It also appears that

certain costs orders were made during the course of the trial in relation to postponements and interlocutory rulings which were immediately taxable and payable. The first respondent has presented one bill of costs incorporating all the costs incurred in the Magistrate's Court action. It is the applicant's case that it is therefore impossible to identify which costs are those that were made immediately taxable and payable.

- [4] On 4 April 2008 the applicant's attorney addressed a letter to attorney Van Wyk stating *inter alia* that he holds instructions to launch an urgent application to interdict the first and second respondents from proceeding with the warrant of execution for the recovery of the amount (inclusive of the taxed costs) awarded to the first respondent in the judgment granted in the Magistrate's Court action. He also requested Van Wyk to hold over the execution of the warrant until Friday 11 April 2008 to enable the applicant to launch this application and informing him that he will seek an adverse order of costs against the first respondent and Van Wyk. After the second respondent again attended at the applicant's premises in Roodepoort to execute the warrant

on 7 April 2008, the applicant approached this Court to obtain a temporary interdict against the respondents.

- [5] Mr. Reinders, counsel for the first respondent, submitted that an alternative remedy was available in the sense that the applicant should have approached the Magistrate's Court and obtained an order in terms of section 78 of the Magistrates' Courts Act which has jurisdiction to order

“... that execution thereof shall be suspended pending the decision upon the appeal or application.”

- [6] It is, however, important to note that section 62 of the Magistrates' Court Act provides that

“(3) Any court may, on good cause shown, stay or set aside any warrant of execution or arrest issued by itself, including an order under section seventy-two.”

It is therefore clear that this Court has jurisdiction to entertain the present application but is entitled to penalise the applicant, if it deems it necessary, by allowing only Magistrate's Court costs, if successful. **O'SULLIVAN v**

MANTEL AND ANOTHER 1981 (1) SA 664 (W) at 670 C -

F.

[7] It appears from the first respondent's opposing affidavit that

“... ek geadviseer is dat ‘n kennisgewing van appèl in elk geval nie die vonnis in die Landdroshof opskort nie.”

The question therefore arises what the effect of the applicant's filing of the notice of appeal was in the circumstances. Section 78 of the Magistrates' Courts Act, No. 32 of 1944, which is applicable in this regard, reads as follows:

“78 Execution or suspension in case of appeal, etc

Where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application. The direction shall be made upon such terms, if any, as the court may determine as to security for the

due performance of any judgment which may be given upon the appeal or application.”

- [8] The said section does not automatically suspend the execution of a judgment upon the noting of an appeal, but only provides that a party may apply for certain relief, whereafter the magistrate may order the suspension of the execution.

If neither of the parties applies for the alternative orders provided for in this section, as in the present application, the common law as to the effect of an appeal comes into operation and the execution of the judgment is automatically suspended. Jones and Buckle **The Civil Practice of the Magistrate’s Court in South Africa**, Vol I and discussion of section 78.

- [9] The result is that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto. **SCHOEMAN v NEDBANK LTD AND OTHERS** 1989 (4) SA 812 (W) at 815 D - 816 C; **NEL v LE ROUX NO AND OTHERS** 2006 (3) SA 56 (SE) at 59 E - I. First respondent’s

view, quoted above, that the notice of appeal does not suspend the judgment, is therefore not correct. Under common law, execution of the judgment is automatically suspended when a proper appeal is noted.

[10] As to the validity of the notice of appeal, it is the first respondent's attitude that due to the fact that the security filed with a notice of appeal was not in accordance with the rules, there was no valid notice of appeal. Therefore there was no valid appeal and the first respondent was entitled to proceed with execution.

[11] It is clear that security need not be given *simul ac semel* with delivery of the notice, but the noting of appeal is not complete until both events have duly happened. **CAMPBELL v MCDONALD** 1920 OPD 255 at 256; **REUBNER v VAN DER MERWE** 1931 SWA 69 at 71. Both the security, as well as the notice of appeal, must be given within the prescribed time. **MOLAGUDI v SNYMAN** 1918 TPD 187 at 189; **SWANEPOEL v GROBBELAAR** 1921 OPD 154 at 155.

[12] After the applicant discovered the defective security a fresh bond of security was couriered to his correspondent. It is not clear when this was filed, but according to the applicant a fresh bond of security was couriered to his correspondent on 11 April 2008 for service and filing at court and he received confirmation on the 25th April 2008 that the fresh security bond has been sent to court for filing. According to the first respondent the security bond was filed on the 8th April 2008. It means that it was filed out of time and that the applicant needs condonation for the late filing thereof. It is also of importance that proper security was only filed after the present application was brought. The applicant therefore needs condonation for the late filing of the bond of security.

[13] As far as the applicant's application for condonation is concerned, the parties are *ad idem* that it should be heard simultaneously with the appeal. In view of the fact that, apart from explaining the late filing of the security, the prospects of success must be considered before granting or refusing the relief claimed, the court of appeal appears to be the appropriate forum to decide this matter. **MOLAGUDI v**

SNYMAN, *supra*; SOUTH AFRICAN DRUGGISTS LTD v BEECHAM GROUP 1987 (4) SA 876 (T) at 881 C – H.

[14] With regard to costs Mr. Engelbrecht submitted, on behalf of the applicant, that the first respondent should pay the costs on an attorney/client scale in view of attorney Van Wyk's conduct, e.g. on 21 February 2008 he undertook to take instructions and revert on whether the first respondent will hold execution in abeyance, but failed to do so. Instead, there were two attempts to execute, on 27 March 2008 and 7 April 2008. Although I do not approve of Van Wyk's conduct, he was entitled to make use of the judgment in his client's favour. In **NUNLAL v PILLAY** 1948 (4) SA 720 (N) the following is stated on 721:

“There is no doubt that the respondent's attorneys must have realised that the appellant intended to appeal but that does not alter the fact that the respondent was entitled to regard his judgment as a right unless he received from the appellant the notice which the rules direct. I do not think that the respondent's attorney, knowing as he did, that no notice of appeal had yet been given, was obliged to peruse the copy of the record served on him and to conclude from the copy of a notice of appeal

dated several weeks earlier that the appeal had been properly instituted. It is particularly in the case of the successful party in litigation that a strict compliance with the rules is necessary before anything can be done to deprive him of the benefit of the judgment which he has obtained." (My underlining.)

- [15] It is evident that the applicant, apart from applying for an interdict, also asks for condonation; he therefore asks for an indulgence. Although there is force in the argument that the first respondent should pay the costs as from the date of filing a proper security bond, when the notice of appeal was in order, Mr. Reinders submitted that the applicant persisted in seeking a special order against the first respondent and therefore compelled the first respondent to oppose it in Court. I agree with this submission. **SWANEPOEL v GROBBELAAR**, *supra* at 156. There is therefore no reason why the usual order namely, the party applying for an indulgence should pay the costs, should not be made.

- [16] Accordingly the following order is made:

1. The first and second respondent is hereby interdicted from proceeding with the execution of the judgment

obtained in the Magistrate's Court for the district of Lindley held at Steynrus under case number 68/2002, pending:

- (a) the outcome of the appeal noted against the judgment under case number 68/2002;
- (b) the outcome of a condonation application for the late noting of the appeal which condonation application is to be heard simultaneously with the appeal; and
- (c) subject thereto that the said condonation application is served and filed within 15 days of the granting of this order.

2. The applicant is ordered to pay the costs of the application.

S.P.B. HANCKE, J

On behalf of applicant : Adv. J.L. Engelbrecht
Instructed by:
Webbers
BLOEMFONTEIN

On behalf of respondents : Adv. S J Reinders
Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

/sp