

Reportable: Yes / No
Circulate to Judges: Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 700/2008

Date heard: 2008-05-30

Date delivered: 2008-06-06

In the matter of:

LORRAINE SOPHIE BOTHA
KHULELEKANI LAUNDRY CC

FIRST APPLICANT
SECOND APPLICANT

AND

JOHANNES JACOBUS WIESE HENDRIKS NO
FIRST RESPONDENT

MARTHA MAGRIETA HENDRIKS NO
SECOND RESPONDENT

HENRY ROBINS RICH NO THIRD RESPONDENT

CYRIL STRYDOM FOURTH RESPONDENT

JOHAN HENDRIKS FIFTH RESPONDENT

THE SHERIFFS SIXTH RESPONDENT

Coram: **MAJIEDTJ**

JUDGMENT

MAJIEDTJ:

1. This is an urgent application for an interdict *pendente lite*, which is opposed by the first, second and third respondents.

2. The applicants seek the following relief in their Notice of Motion:

“2.1 That the first (to) third respondents be interdicted from denying the applicants access to Erf 4128 for purposes of trading at the said premises as a laundry service provider pending the outcome and finalisation of the Appeal under case number CA&R 37/08.

2.2 That the sheriff be ordered to release the machinery and tools of trade attached in terms of Annexure A hereto and marked (x) and (✓) for purposes of trade only pending the outcome and finalisation of the Appeal under case number CA&R 37/08 and subject to the provision that the abovesaid goods shall remain under judicial attachment pending the outcome and finalisation of the aforesaid appeal.

2.3 That the first (to) third respondents pay the costs of the application.”

3. The first applicant is the sole member of the second applicant close corporation. It is not in issue on the papers that the second applicant had at all material times hereto traded as a laundry service provider on the property known as erf 4128, De Aar (*“the property”*).

4. The first, second and third respondents are cited in their official

capacities as trustees of the JJW Hendriks Trust (IT 2151/1995 – “*the Trust*”).

5. The fourth and fifth respondents have been cited merely due to their potential interest in the matter – they are tenants of certain portions of the buildings on the property. The sixth respondent has been cited due to the fact that he had evicted the applicants from the property and had attached certain goods in execution of a judgment obtained by the Trust against first applicant, to which I shall make reference later.

6. Those facts which are either common cause or are not seriously in issue on the papers are the following:

6.1 The first applicant had concluded a written deed of sale in respect of the property on 19 November 2003 with the first and second respondents in their capacity as trustees of the Trust. It is not clear on the papers when the third respondent had also become a trustee in the Trust, but nothing turns on it. The third respondent acted as attorney for the Trust in the Magistrate's Court proceedings referred to hereinafter and also in these proceedings.

6.2 Pursuant to the aforementioned written deed of sale, the first applicant occupied the property and conducted a laundry service from it. During the course of 2005 the close corporation, the second applicant herein, was established. As stated before, the first applicant is the sole member thereof.

6.3 On 3 April 2008 the Trust obtained judgment in the Magistrate's Court at De Aar against the first applicant for breach of contract in respect of the written deed of sale regarding the property. That judgment was for:

- a) cancellation of the deed of sale of 19 November 2003;
- b) an order evicting the first applicant from the property and placing the Trust in possession of the property;

- c) an order that the first applicant pay the amount of R8000.00 to the Trust in respect of unpaid instalments due on the written deed of sale;
- d) an order that the first applicant pay the amount of R32246,90 to the Trust in respect of outstanding rates and service charges on the property;
- e) an order in terms whereof the first applicant forfeits the amount of R180 000,00 already paid in terms of the deed of sale to the Trust;
- f) interest at 15,5% per annum from date of summons; and
- g) costs of suit.

6.4 On the following day, namely 4 April 2008, the Sheriff, acting on a warrant of execution in pursuance of the aforementioned judgment, evicted the first applicant from the property and attached all the equipment and tools of trade situated at the property.

6.5 The first applicant noted an appeal against the aforementioned judgment – this notice of appeal was noted a few days after the due date prescribed in the Magistrates' Court Rules. An application for condonation of the late filing of the notice of appeal was also filed at the Magistrate's Court. The notice of appeal contains detailed grounds of

appeal. Security in the amount of R1000.00 has also been furnished.

7. It is common cause that the first applicant's eviction and the attachment of the equipment and tools of trade by the sixth respondent occurred in execution of the judgment of the Magistrate at De Aar. The present application is aimed at restoring the *status quo ante* as it prevailed prior to the judgment of the magistrate.
8. Section 78 of the Magistrates' Court Act, 32 of 1944, provides 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.”

9. It is common cause that no application that the judgment be carried into execution or that execution thereof be suspended pending the decision on appeal, has been filed with the magistrate. As a consequence, the common law regarding the effect of an appeal comes into operation.

See in this regard:

Malan v Tollekin 1931 CPD 214 at 215-216 where Gardiner JP

held as follows:

“It seems to me that when neither party applies and neither of these orders is made, the ordinary common law rule governs the matter, and execution is automatically suspended.”

10. This aforementioned common law rule of practice is well established and in terms thereof the execution of a judgment is automatically suspended upon the noting of an appeal so that consequently, pending such appeal, the judgment cannot be carried out and no effect can be given thereto.

See generally:

Gentiruco AG v Firestone SA (Pty) Ltd 1972(1) SA 589 (A) at 667;

Standard Bank of South Africa Ltd v Stama (Pty) Ltd 1975(1) SA 730 (A) at 746;

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977(3) SA 543 (A) at 545 A;

Schoeman v Nedbank Ltd & Others 1989(4) SA 812 (W) at 815 D – 816 C.

In **Reid and another v Godart and another 1938 AD 511** at 513 De Villiers JA expounded the rationale for this common law rule of practice as follows:

“The foundation of the common-law rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by a levy under a writ, or by the execution of a judgment in any other manner appropriate to the nature of the judgment appealed from.”

(cited with approval in: **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd**, *supra* at 545 B-C).

11. Mr. Van Niekerk, who appeared on behalf of the first, second and third respondents, conceded that **Schoeman v Nedbank Ltd and others**, *supra*, is direct authority that, once an appeal is noted, steps which had been taken in execution of the judgment appealed against (such as an attachment), cannot remain in force. He submitted, however, that that case had been wrongly decided and referred me to an *obiter dictum* of Flemming J in **Le Grange en andere v Boksburgse Stadsraad en andere 1991(3) SA 222 (W)** at 229 I – 230 A.

I do not agree. The *ratio decidendi* in **Schoeman v Nedbank Ltd and others** accords with the general rationale underlying the automatic suspension of a judgment by the noting of an appeal (see the cases referred to above). Moreover, I am fortified in my view by the construction of the Magistrate Courts' Rules of civil practice, namely:

- a) Rule 36(7) provides that in all cases, except where judgment has been entered by consent or default, process in execution of a judgment shall not be issued without leave of the court applied for at the time of granting the judgment, before the day following the one on which the judgment is given.
- b) Rule 51(3), on the other hand, provides that an appeal may be

noted within 20 days after the date of the judgment appealed against or within 20 days after receipt of the written judgment, whichever is the longest.

Based upon this construction, it is manifestly evident that in many cases steps in execution may be taken before an appeal is noted, since this is exactly what the Rules provide for. In such circumstances it seems to me that common sense and sound practice require that steps in execution already taken should be reversed in line with the common law practice of the suspension of the judgment upon the noting of an appeal against such judgment.

12.1 A further matter raised by Mr. Van Niekerk on behalf of the first three respondents, is the fact of the late noting of the appeal. According to his submission, given the fact that only the court hearing the appeal can decide the merits of the condonation application, the appeal cannot be said to be duly noted in terms of the Rules. This submission is devoid of any merit and is the result of an obfuscation of two different procedures, namely condonation and the noting of an appeal. Rule 51(4) reads as follows:

“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 R1000.....”

The only requirements prescribed are therefore:

- a) Delivery of a notice of appeal; and
- b) Furnishing of security in the amount of R1000.00.

“*Delivery*” means filing with the clerk of the court and serving a copy on the respondent and “*notice*” means notice in writing;

see: Magistrates’ Court Rule 2(1)(b).

While strict compliance with the Rules is necessary before a successful party can be expected to be deprived of the benefit of the judgment obtained, such compliance relates only to delivery of the notice and the furnishing of the security as set out above.

See in this regard:

Nunlal v Pillay 1948(4) 720 (N) at 721.

12.2 Condonation has nothing to do with whether an appeal can be said to have been duly noted. It concerns only the question whether an appeal may be proceeded with in the appeal court. As a general rule it is firmly established that in all cases where time limits apply, a High Court has an inherent right to grant condonation for non-compliance with such time limits, where the principles of justice and fairness demand same and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the Court.

See generally:

Yunnan Engineering CC and Another v Chater and Others 2006(5) SA 571 (T) at 578 H-J.

12.3 The difference between these two procedures can be illustrated by reference to two decided cases:

a) In **Multilaterale Voertuigongelukke fonds v Pretorius 1994(1) SA 814 (O)**, Hattingh J confirmed the practice in that

Division that matters ancillary to appeals from the lower courts (e.g. condonation applications) be heard by the court hearing the appeal, since the prospects of success on the merits is an important aspect for consideration in a condonation application. This bears no relation whatsoever to the question whether the appeal can be said to be “duly noted” in the lower court (and thus suspending execution of the judgment).

b) In **Herf v Germani 1978(1) SA 440 (T)**, an appeal was struck from the Roll and it was held that the effect thereof is that the appeal has **lapsed** and it is thus deemed that the appeal **has been discontinued**, so that the judgment appealed against would no longer be suspended. This striking off does not, however, preclude an application by an appellant for condonation of the failure to **prosecute** the appeal. It is clear therefore that **noting** an appeal and applying for condonation for non-compliance so as to continue **prosecuting** the appeal are different, albeit interrelated, procedures.

12.4 To summarize therefore: the first applicant has duly noted an appeal herein, since she has complied with the provisions contained in Rule 51(3) read with rule 51(4) (and rule 51(7) of the Magistrates’ Court Rules (it is common cause that the first applicant has furnished security in the sum of R1000.00 as required in Rule 51(4)). The fact that she has noted her appeal late and that she seeks condonation for this non-compliance from the court of appeal, has no bearing whatsoever on the due noting of her appeal in the Magistrate’s Court. Whereas condonation is a process in the High Court where the appeal is to be heard to decide whether she may in fact proceed with her appeal, the due

noting of the appeal is a process in the Magistrate's Court, which has in fact been finalised.

13. Mr. Van Niekerk has raised a further matter for consideration during his argument. He submits that on the applicants' papers the second applicant was the occupier of the immovable property and possessor of the movable tools of trade and equipment at the time of eviction and attachment by the sixth respondent. He submitted that second applicant has no *locus standi* to rely on the suspension of the execution of the judgment, since it was not a party to the proceedings in the Magistrate's Court. He submitted further that the first applicant also cannot seek suspension of the execution of the judgment, since she did not in her personal capacity occupy the immovable property, nor did she personally possess the movable tools of trade and equipment. He submitted that, as a consequence, there is no *status quo* which can be restored in respect of the first applicant.
14. The foregoing submissions are based on a misconception. The first applicant concluded the deed of sale with the Trust at a time when she was trading in her personal capacity and when the second applicant had not been established as yet. Thereafter she registered the second applicant close corporation of which she is the sole member. The first applicant averred that she is wholly dependent on the business of the second applicant as a source of income. This was not disputed by the first three respondents. It was also not disputed that the second applicant was established

only after the conclusion of the deed of sale with the Trust.

15. The requirements for an interdict *pendente lite* are as follows:

- a) A *prima facie* right, though open to some doubt;
- b) A well grounded apprehension of irreparable harm if the interim relief is not granted;
- c) The balance of convenience favours the granting of interim relief;
- d) That the applicant has no other satisfactory remedy.

See:

LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969(2) SA 256 (C) at 267 A-F.

Mr. Van Niekerk's submissions, *supra*, concerns the first requirement above, namely a *prima facie* right although open to some doubt.

16.1 It is not in issue that the first applicant has a right, emanating from the written deed of sale, to be in possession and occupation of the property. Prior to 2005 she exercised that right in her personal capacity. Subsequent to the establishment of the second applicant close corporation, she exercised that right through another legal entity, namely the close corporation of which she is the sole member. There cannot be any doubt whatsoever (nor has any been suggested in argument) that the close corporation is the vehicle through which she conducted and still conducts her business and from which she derives her sole source of income. In my view it matters not that the second applicant is a separate legal entity (on the contrary, that is the whole motivation for trading in the name of the close corporation, namely so as to protect her own personal estate).

16.2 The argument that, because the close corporation was in occupation and possession of the property, such occupation and possession cannot be restored to the first applicant, is a misconception of the law. It confuses the *ius possidendi* of the first

applicant (i.e. the entitlement to demand control over the property by virtue of the right emanating from the deed of sale) with the *ius possessionis* of the second applicant (i.e. the right of possession).

Van der Merwe, Sakereg, 2nd edition at 91 cautions (with good reason as the present case illustrates) as follows:

“Om verwarring te vermy, behoort ‘n duidelike onderskeid gemaak te word tussen besit as ‘n regsfeit en die gevolge van besit wat uit die regsfeit vloei.”

See also:

Badenhorst, Pienaar, Mostert: Silberberg & Schoeman’s The

Law of Property, 5th ed at 275;

Kleyn & Boraine, Property at 113-114.

In Silberberg & Schoeman (*supra*) it is pointed out that:

- (a) “*(the ius possessionis) is available only to a person actually in (physical) possession of a thing; and*
- (b) “... a person may have the intention to control a thing without actually being in possession of the particular thing and, conversely, he or she may have a right of possession without having a *ius possidendi*,” (*ibid*).

This is particularly apposite to the facts in the present matter.

16.3 The situation in the present matter is analogous to a scenario where a purchaser enters into a lease agreement with a lessee who then occupies the premises and, following upon litigation between the

seller and the purchaser, the right to possession of the premises has to be restored to the purchaser in terms of a Court order or by operation of law. In such an instance it matters not that the purchaser was not in physical possession of the premises. The lessee does not enter into the picture at all and the right to possession must simply be restored to the purchaser who can thereafter decide as to whether to continue letting the premises or to occupy the premises him/her/itself.

16.4 A further illustration of this principle can be gleaned from the facts and decision in **Strydom en 'n ander v De Lange en 'n ander 1970(2) SA 6 (T)**. The facts were briefly as follows:

- (a) An erf was purchased by the first appellant as nominee of the second respondent in accordance with an informal oral trust agreement between them. The erf was registered in the name of first appellant as nominee.
- (b) First appellant also acted as agent of the second respondent in terms of a mandate granted to him (the first appellant) to let or sell the erf with the dwelling on it, subject to second respondent's prior approval.
- (c) First appellant then concluded a deed of sale with second appellant in respect of the erf and advised the second respondent of the sale, also claiming commission (qua agent) in the process. Second respondent refused to confirm the sale and challenged the first appellant's right to deal with the property without his prior consent. The second respondent notified the first appellant of his intention to take transfer of the property

himself after the present tenant had vacated it.

- (d) After the tenant vacated the property, it was occupied by the first respondent. First appellant applied ex parte for and was granted an order that first respondent vacate the property – the order also served as a temporary interdict.

(e) Upon receipt of the order, the first respondent applied ex parte for and was granted a temporary spoliation order, with the second respondent and second applicant also joining the proceedings. First appellant unsuccessfully applied for a spoliation order, the Magistrate finding that he had acted *mala fide*. The temporary spoliation order in favour of the first respondent was confirmed.

In its judgment on appeal, the Court held:

- (i) that the second respondent as beneficial owner had lawful possession of the erf and that right was enforceable against the first appellant as nominee who merely had bare dominium of the erf (at 11 H; 12 B-E).
- (ii) that the rights of second respondent and second appellant might be weighed against each other in the same way as the personal rights of two separate purchasers who had purchased the same property from the same seller and therefore, before transfer, the prior personal right (i.e. of the second respondent) had preference (at 14 D-G).

In my view the legal position of the second respondent in that case is similar (albeit not identical) to that of the first applicant in the present matter and that of the first appellant is more or less similar (in law, not in fact) as that of the second applicant herein.

17. For these reasons I am of the view that there is no merit in Mr. Van Niekerk's contention that the *status quo* cannot be restored in the present circumstances. He has, during oral argument, drawn my

attention to clause 10.3 of the written deed of sale which provides that prior to transfer of the property into the name of the first applicant, she may not let the property without prior written consent of the seller (the Trust). But that is not the case here. The first applicant has not let the property to another entity. All that has happened, as I have pointed out above, is that she has conducted trade in the name of another legal entity of which she is the sole member. There is no lease agreement between the first applicant (*qua purchaser*) and the second applicant (*qua occupier*).

18. For the aforementioned reasons I am of the view that possession of the property and of the movable tools of trade and equipment should be restored to the applicants forthwith, pending the outcome of the appeal which is pending in this Court. Costs must follow the outcome.

19. The following order is issued:

19.1 **The first, second and third respondents are interdicted from denying the applicants access to erf 4128 for purposes of trading on the said premises as a laundry service provider pending the outcome and finalisation of the appeal under case number CA&R 37/08.**

19.2 **The Sheriff of the Magistrate's Court, De Aar, is ordered to release the machinery and tools of trade attached in terms of annexure A to the first applicant's founding**

affidavit and marked (x) and (✓) for purposes of trade only, pending the outcome and finalisation of the appeal under case number CA&R 37/08 and subject to the provision that the above said goods shall remain under judicial attachment pending the outcome and finalisation of the aforesaid appeal.

19.3 The first, second and third respondents are ordered to pay the costs of the application jointly and severally, the one paying the others to be absolved.

**SA MAJIEDT
JUDGE**

FOR THE PLAINTIFF : ADV BLOEM
INSTRUCTED BY : TOWELL & GROENEWALD ATTORNEYS
FOR THE PLAINTIFF : ADV JG VAN NIEKERK SC
INSTRUCTED BY : L COETZEE