

IN THE HIGH COURT OF SOUTH AFRICA

Reportable

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:12829/99

DATE:18-11-2002

In the matter between:

THE WESTERN CAPE HOUSING DEVELOPMENT BOARD

First Plaintiff

JOHN WILLIAMS AFRICA N.O.

Second Plaintiff

and

ASHRAF ABDULRAHIMAN PARKER

First Defendant

MOHAMMED ESSACK MOHAMMED

Second Defendant

J U D G M E N T

T

COMRIE, J:

1.This is an opposed application by the defendants for a stay of proceedings, alternatively for a postponement of the trial which was due to commence on Wednesday 13 November, 2002. During the morning of that day the case stood down so that further affidavits could be filed. The argument began after lunch and continued until the close of business the next afternoon.

2.The general background to the matter is that the defendants, a partnership of attorneys, were appointed to act in terms of a housing subsidy scheme. In this role they were paid substantial sums of money by the plaintiffs' predecessors, which, so the plaintiffs claim, the defendants misappropriated or misused. In 1998 the predecessors instituted sequestration proceedings against the defendants, which proceedings were opposed. Certain issues were referred for oral evidence. At that hearing both sides were represented by senior counsel. After listening to evidence for several days, Davis, J on 8 December 1998 refused the application for provisional sequestration with costs. Those costs were duly taxed by agreement in the amount of R346 000,00. They have not been paid. The date of the allocatur was 23 November 1999.

3.In December 1999 the present (successor) plaintiffs instituted fresh proceedings against the defendants by way of action. They claimed:

(a)payment of the sum of R3 487 114,00;

(b)payment of the sum of R200 220,80;

(c)interest and costs.

They also claimed an order declaring that the indebtedness comprised by the taxed costs had been extinguished by set-off against the claims set out in the particulars of claim. The action was defended and various defences were raised, one of them being, in part, *res iudicata*.

4.As the trial approached and on 6 November 2002, the defendants' attorney, Mr S Levitan, withdrew for want of financial cover. He asked his

clients for R300 000,00 which, they state, they were and are unable at present to raise. The defendants have managed in the meantime to secure the services of an alternative attorney, Mr S Zakon, and of Advocate Crowe. I understand that they are not instructed as on trial. Mr Crowe told me from the Bar that if the trial were to be postponed to the second term of next year, his clients would be able to raise the finances needed to fund the litigation, even I were to refuse the stay. It is clear to me that Mr Crowe and Mr Zakon could not adequately have prepared themselves to fight the trial in the limited time available to them; nor do I think it reasonable to expect them to do so now if (as suggested by Mr Louw for the plaintiffs) the trial were to stand down for a couple of days.

5.The application for a stay is until the plaintiffs have paid the taxed costs referred to earlier, with interest. Interest was not questioned by the plaintiffs in their answering affidavit or by their counsel in argument. The defendants state that they were previously led to believe that in the light of section 3 of the State Liability Act 20 of 1957, there was nothing which they could do about those costs. They have now been advised, however, that they are entitled to apply for a stay of proceedings pending payment of the costs, which is timely advice given their current financial circumstances.

6.The law is discussed by Herbstein & Van Winsen: Civil Practice 4th ed from page 254. It appears from what the learned authors state and from the cases cited that a Court will be slow to exclude a litigant from proceedings because the costs of previous litigation remain unpaid. Some element of vexatiousness is usually required though not, it would seem, invariably (Western Assurance Co v Caldwell's Trustee 1918 AD 262; Strydom v Griffin Engineering Co 1927 AD 552; Potechefstroom Town Council v Botes 1929 TPD 4 at 6; Hurter v Hough en 'n Ander 1989(3) SA 545 (C)). In the last-cited case Conradie, J (as he then was) said at 553A:

*"Dit bring my by die beweerde kwelsugtigheid van die aansoek. In hierdie verband het mnr Van Schalkwyk daarop gewys dat Hurter se koste van die vorige aansoek om skrapping asook die Wetsgenootskap se koste van toetrede tot daardie aansoek nog nie betaal is nie. Dit, betoog hy, tesame met die instelling van die huidige aansoek op wesenlik dieselfde gronde as vantevore, regverdig 'n bevinding van kwelsugtigheid. Dit is egter nie nodig om 'n litigant se optrede as kwelsugtig aan te merk voordat die Hof sy diskresie met betrekking tot die opskorting van latere verrigtinge uitoefen nie. Indien die partye maar by die meerdere gedinge dieselfde is en die geskilpunte wesenlik dieselfde is, is dit die eise van regverdigheid wat die deurslag gee. Strydom v Griffin Engineering Co 1927 AD 552."*

7.Technically, the applicants in the sequestration proceedings differ from the present plaintiffs, but it is admitted that as predecessors and successors, they are substantially the same. The relief claimed also differs.

Sequestration was sought in the prior proceedings whereas now the plaintiffs pray for judgment for the payment of sums of money. Nothing was really made in argument of the difference in relief, presumably because sequestration and action represent (at least in this instance) two ways of

achieving the same objective, namely recovering monies believed to be owing. The element of vexatiousness in this case is said to arise from the identity of and close connection between the causes of action. The test is formulated by Herbststein & Van Winsen, *supra*, at 255, as:

*"That the issues between the parties were substantially the same, or that the issues were closely connected in the sense that they arose out of what passed between the parties in relation to the subject matter claimed in both actions."*

And at 256:

*"Substantial identity of the causes of action is essential, and mere connection in respect of the subject or the evidence not producing substantial identity in the actions does not suffice to bring into operation the rule that the second action should prima facie be stayed."*

*The court will not order a stay pending the payment of costs when the causes of action, although arising out of the same facts, are different, because no inference of vexatiousness or abuse of the court's process is to be drawn from the institution of a second action in such circumstances and there is no mere repetition. The court is not, however, astute to find technical points of difference when in substance the controversy bears on the same transaction or event."*

8. I think these passages accurately state the law. It should be borne in mind, however, that varying expressions are to be found in the decided cases, such as causes of action, grounds, issues and relief.

9. The bulk of the plaintiff's claim (the approximately R3.5 million) is itemised in paragraphs 13.1 to 13.7 of the particulars of claim. Here seven specific transactions are listed, the aggregate amounting to R3 487 114,00. In respect of all seven transactions the plaintiffs allege that the first defendant, in breach of the governing agreement, committed acts of theft; alternatively, that in breach of the agreement, he acted negligently. Clause 3.4 of the agreement entitles the plaintiff to recover from the defendants loss or damage resulting from payments negligently made. It is these self-same seven transactions which featured in the sequestration proceedings and which were the subject matter of oral evidence before Davis, J. The transactions were presented to him primarily as thefts. The learned judge held that the predecessors had, in respect of each of the transactions, failed to establish a prima facie liquidated claim, as that expression is understood in the law of insolvency. I should mention that the gravamen of the judgment was not that the amounts were unliquidated, but that the alleged thefts were not proved. The case law is clear that in a stay application such as this, the judgment of Davis, J. is presumed to be correct. The judgment went further (typed page 17):

*"Mr Louw, perhaps sensing the difficulty in making out a prima facie case of theft, sought to construct another basis on which to justify a liquidated claim, namely a rescission of the contract by applicants pursuant to the theft by respondents when they used the applicants' money, inter alia, to settle third party debts (the payments of which were not subject to the liquidated*

*claim enquiry because respondents have repaid those amounts on 16 October 1997). To this end, Mr Louw referred to a letter of the State Attorney addressed to second respondent, dated 29 January 1998 in which the latter was informed that the Provincial Housing Board either accepted repudiation or, failing which, cancelled the contract."*

10. The learned judge elaborated on this contention, including the supposed consequence of restitution, considered it and rejected it. He added: *"It may well be that applicants have an excellent case in respect of breach of contract, but there is a tried and tested procedure to obtain relief in such a case."*

11. Before examining the differences, it is as well to focus on what is substantially the same or identical. At the forefront of the plaintiffs' particulars of claim and in respect of the major amount claimed, are the allegations of theft, elaborately pleaded in respect of the seven transactions. Indeed, paragraph 14.4 expressly alleges:

*"14.4 First defendant accordingly committed acts of theft in respect of the said amounts."*

I mention en passant that it was this set of allegations which drew the interesting plea of *res iudicata*. These causes of action, namely the thefts, appear to be identical to the causes of action before Davis, J., whether or not the former were based on breach of contract. If not identical, they are substantially the same. Theft is theft, whether it takes place in breach of contract or otherwise. On the authorities it is *prima facie* vexatious to bring the defendants before the Court a second time on the same or substantially the same causes of action, without paying the costs of the prior litigation.

12. It is true that the particulars of claim contain an alternative, namely negligence (i.e. payments negligently made); see paragraph 14.5. As far as counsel told me and as far as I have been able to glean from the judgment of Davis, J., negligence was not an issue in the sequestration proceedings. It seems to me that the addition of this new cause of action in the alternative does not avoid the vexation for so long as the allegations of theft stand as part of the plaintiffs' case. They have not been abandoned. Furthermore, in this particular case, it appears likely that the evidence in relation to negligence will traverse much the same ground as before and thus may be open to the "*closely connected*" objection.

13. Mr Louw addressed a full argument to me which I understood in summary to be as follows. That the plaintiffs have no need to rely on theft or negligence. They allege a cancellation of the contract (paragraph 16) which is admittedly disputed by the defendants. The allegation reads:

*"16. Insofar as may be necessary plaintiffs aver that the agreement was duly cancelled."*

If one reads certain answers given by the first defendant during viva voce evidence, together with the trial particulars (or want of them), then there is every reason to accept that the termination of the contract was justified. The plaintiffs are accordingly entitled to claim restitution.

Again reading the first defendant's viva voce answers and the trial particulars it is plain that he and his partner have no defence to a claim based on restitution. In short, therefore, Mr Louw submitted that the plaintiffs enjoy excellent prospects of success in the action, regardless of whether they prove theft or negligence and that such prospects should be accorded heavy weight in the exercise of the Court's discretion.

14. I am not able to say whether this is the same argument as Mr Louw advanced before Davis, J, to which I referred earlier, or a variant thereof. Having read the prior judgment and having heard no evidence myself, I think it would be premature for me to accept that the position is as simple and straightforward as Mr Louw contends. At all events the allegations of theft remain.

15. Counsel for the plaintiffs placed no reliance on the claim for R200 220,80 which, I was told, represents a kind of calculated shortfall. This additional claim does not remove the foregoing vexation.

16. I turn to consider the question of set-off ex tunc. Before set-off can operate the reciprocal debts must be liquidated. That is settled law: Christie: Law of Contract 4th ed at 554. Mr Louw accepted that in the present case there would be no practical difference between liquidated for the purposes of set-off and liquidated for the purposes of section 10 of the Insolvency Act. Davis, J accepted that were the thefts proved then the amounts involved would probably constitute liquidated claims. As I have said earlier, the case before him failed for want of sufficient proof of theft. I too accept that if the plaintiffs can prove the alleged thefts and surmount res iudicata, then the seven amounts making up R3 487 114,00 may well be liquidated ex tunc. That conclusion is less apparent if the plaintiffs in this action were to succeed on the basis of negligence or restitution. Here it may be noted that clause 3.4 of the agreement refers to liability "*for any loss or damage suffered*" as a result of negligent payments. This raises the spectre in relation to set-off of proof of damages and the possible absence, when summons was issued, of a liquidated debt. The same may be true, depending on the circumstances, if the plaintiff succeeds on the basis of restitution.

17. I must nonetheless allow for the prospect that plaintiffs overcome the plea of res iudicata and prove the facts, as to which the judgment of Davis, J is presumed, in this application, to be correct. I must also allow for the prospect that the plaintiffs succeed on the basis of negligence or restitution and in a way which produces a liquidated debt or debts, prior to summons, sufficient to match or exceed the taxed costs. If I grant a stay that would deprive the plaintiffs of their possible set-off, though not necessarily of ultimate payment. That at least must go into the scale in the plaintiffs' favour when it comes to the exercise of a discretion.

Mr Louw, however, advanced a further argument in this regard.

18. He pointed out that the plaintiffs have alleged the set-off of the costs' indebtedness in their particulars of claim and prayed for a corresponding declarator. The pleaded basis for the relief is that the plaintiffs' claims, if proved, are liquidated amounts and that set-off would operate ex tunc. In

their plea, the defendants deny liability, deny the plaintiffs' claims are liquidated, and dispute set-off. *Litis contestatio* has intervened. At a pre-trial conference the defendants agreed that the issues appear from the pleadings. They therefore admitted the obvious, namely that set-off was an issue to be decided at the trial. Mr Louw submitted that if I were to grant a stay pending payment of the costs, I would be taking one of the issues out of the trial action and resolving it in the defendants' favour. The defendants had elected to plead rather than to bring a timeous application for a stay. They were bound by that election and it was not competent for me to decide the issues otherwise than as part of the trial.

19. It appears to me, however, that the defendants were faced by section 3 of Act 20 of 1957. They could not execute on the costs unless perhaps they launched some kind of contempt proceedings, which would have been risky since they were likely to be met by the answer of set-off coupled with the intention of the plaintiffs to commence action. The defendants could not apply for a stay until the plaintiffs actually issued summons, otherwise there would be nothing to stay. In their particulars of claim, the plaintiffs have appropriated the issue of set-off by pleading it and claiming relief. As Mr Crowe pointed out, the defendants were obliged to plead thereto and *litis contestatio* inevitably followed. At best for the defendants they might have sought to defer their plea while an application for a stay was brought and determined. On that hypothesis, they were likely to have been met by a similar argument to the present one. The plaintiffs would, I suspect, have contended that the defendants were seeking to avoid an issue which had been fairly and squarely pleaded in the particulars of claim. The plaintiffs would also surely have insisted on the defendants filing their plea timeously and failure to do so would have invited notice of bar. It does not seem to me that a plaintiff, simply by pleading set-off of prior costs and eliciting a plea, can deprive a defendant sued for a second or further time, of his right to apply for a stay until the previous costs have been paid. Without suggesting any impropriety on the part of the plaintiffs in the present case, to uphold Mr Louw's argument would afford litigious plaintiffs an undesirable device with which to meet otherwise meritorious stay applications.

20. In my view, the defendants are entitled to have their stay application determined upon its true merits and they are not precluded by the fact that set-off is an issue in the trial action.

21. A factor relevant to discretion which is occasionally mentioned in the decided cases is the ability to pay costs (compare Meyer v Meyer 1945 TPD 118). Mr Louw emphasised that the first plaintiff is a Housing Development Board and that we are dealing with what he called "*public money*". That may be so, but the first plaintiff deals in millions and payment of the defendants' taxed costs would be little more than a drop in that ocean. I am more concerned about the defendants' ability to pay an eventual judgment debt, if that should be ordered. I must presume, however, that in pursuing this litigation, the plaintiffs have assessed the position for themselves.

22. To sum up, I am satisfied that the present action is vexatious; and unless

the plaintiffs pay the defendants' taxed costs of the previous proceedings, that it is unduly burdensome to the defendants for them to be embroiled in the present litigation with its concomitant expense. In the exercise of my discretion I cannot find sufficient reason to make an order other than what I conceive to be the usual order, namely a stay of proceedings.

23. In this event, Mr Louw intimated that the trial would have to be postponed. The defendants, having achieved success, are entitled to the costs of the stay application. Because the application was brought at such a late stage, Mr Crowe correctly accepted that the defendants should be responsible for the wasted costs occasioned by the postponement. Given that the plaintiffs' counsel and attorney spent part of the first day and the whole of the second day in court arguing the stay application, it will be for the taxing master to determine which costs have been wasted.

24. The order is as follows:

1. The present action is stayed until such time as the plaintiffs pay the defendants' taxed costs in the sum of R346 000,00 incurred in the sequestration proceedings (case number 9161/98), together with interest thereon at the rate of 15.5% from 23 November 1999 until the date of payment.
2. The trial is postponed *sine die* and may not be re-enrolled until there has been compliance with paragraph 1 of this order.
3. The plaintiffs jointly and severally are to pay the costs of the application for a stay.
4. The defendants jointly and severally are to pay the wasted costs occasioned by the postponement, including the costs of two counsel.

---

COMRIE, J