

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case No: 2446/2022

Date Heard: 12 September 2024

Date Delivered: 08 October 2024

In the matter between:

NELSON MANDELA BAY MUNICIPALITY

Applicant / Defendant

and

CHRISTOPHER HENRY HARDING

Respondent / Plaintiff

JUDGMENT

MULLINS AJ:

[1] Alleging that on 9 March 2021 he fell into an open stormwater drain the Respondent (as plaintiff) instituted an action against the Applicant (as defendant) for damages arising out of the injuries he sustained as a result thereof.

[2] The Applicant defended the action and in due course the matter proceeded to trial on the merits only.

[3] On 5 December 2023 the trial judge handed down judgment, the order reading as follows:

- “1. The defendant is ordered to pay the plaintiff’s proven damages arising from the plaintiff’s fall into an uncovered stormwater drain on 9 March 2021;
2. The defendant is ordered to pay the plaintiff’s taxed costs of suit on a party and party scale in respect of the separated proceedings on liability.”

[4] Thereafter, on 4 June 2024 the parties reached an agreement, which was made an order of court, in terms of which the Applicant would pay to the Plaintiff R650,000.00 in full and final settlement of his claim for general damages, the balance of the damages claim being postponed to an arranged date.

[5] Significantly, the court order provided that the general damages was to be paid within 30 days of the order, i.e., by 3 July 2024.

[6] The Applicant failed to make payment by 3 July 2024 and in the absence of any communication from the Respondent explaining the failure, on 7 August 2024 the Respondent’s attorney applied for and was issued with a writ of attachment, which was sent to the Sheriff for execution.

[7] Before the writ could be served and executed, on 20 August 2024 an employee of the Applicant (not its attorney of record) contacted the Respondent’s attorney’s office requesting the firm’s bank details, which were duly furnished.

[8] Notwithstanding this development, on 21 August 2024 the Sheriff served the writ and in the process attached a number of the Applicant’s motor vehicles, being nine in all. I am advised that two of the vehicles have been removed by the Sheriff.

[9] On 23 August 2024 the Applicant’s attorneys wrote to the Respondent’s attorneys advising them that a criminal case of “*alleged fraud*” had been opened and requesting that pending the finalisation of the criminal case the Respondent agree to a stay of the execution process and the postponement of the taxation of the bill of costs in respect of the trial on the merits which had been set down for later that

month, failing which the Applicant would have no alternative but to approach the court. A response was requested by 26 August 2024.

[10] As the Respondent's attorney did not revert by the 26th, on 4 September 2024 this application was launched on an urgent basis, seeking the following relief (excluding prayer 1, which deals with urgency):

"2. That execution of the writ of attachment dated August 2024, including the removal of the attached movables, recovery in terms of the taxed allocatur dated 28 August 2024, and the trial proceedings in respect of the quantum (set down for 19 March 2025), and/or any proceedings ancillary thereto, be and are hereby stayed pending the final determination of an action based on fraud, which is to be instituted by the applicant within 30 (thirty) days of the granting of this order;

4.¹ That respondent be ordered to pay the costs of this application."

[11] The application was opposed by the Respondent.²

[12] On behalf of the Applicant a legal adviser in its employ states as follows:

"9. On Monday, 19 August 2024 I received information that the respondent did not injure himself by falling into an uncovered or open stormwater drain on 9 March 2021 in Despatch, as he had alleged and testified during the trial, which resulted in judgment being granted in his favour, see annexure "KN1" hereto. I was informed that he had injured himself in another manner.

10. In light of the above information received, I was duly authorized to open a case on behalf of the applicant with the South African Police Service, to investigate the alleged fraud, as set out above.

¹ There being no paragraph 3.

² Why the Sheriff was not cited as an interested – and necessary – party was not challenged by the Respondent. Because of the order I intend to make nothing turns on the issue.

11. I confirm that on 22 August 2024 a case was opened with the South African Police Service Despatch under case number 93/08/2024.”

[13] In support thereof a detective warrant officer in the South African Police Service confirms in his first affidavit that a complaint had been laid and that:

“5. At this stage, the investigation is in its very early stages and therefore I am not in a position to disclose any information and/or documentation contained in the docket and pertaining to the investigation, as it could *inter alia* jeopardise the investigation and the safety of the witnesses.”

[14] The detective followed up his first affidavit with a further affidavit in which he states:

“6. I have compared Mr Harding’s particulars of claim with the witness statement contained in the docket, which I cannot disclose (for the reasons set out in my affidavit of 28 August 2024), and I can confirm that the two versions are irreconcilable.”

[15] In his answering affidavit the Respondent denies having committed fraud and says:

“5. I testified under oath at the merits trial in this Honourable Court as to what occurred, I told the truth, I stand by the evidence that I gave. I deny that I committed fraud and I am dismayed by the unfounded allegation against me.”

[16] He states further that he has not been arrested, nor has he received a summons, nor has he been contacted by the police.

[17] Dealing with the affidavit of the Applicant’s legal adviser the Respondent’s attorney, who filed a supporting affidavit, points out that the allegation of fraud is inadmissible hearsay in that the deponent does not say:

- (a) Who furnished the information;
- (b) What the information consisted of;
- (c) How it came about that he received the information;
- (d) Why he did not obtain an affidavit from the person who furnished this information;

[18] He states further that it is significant that the criminal charge was apparently laid the day after the writ had been served (21 August 2024) despite the fact that on his extremely vague and unsubstantiated version “*he had received the information on 19 August 2024.*”

[19] In addition to challenging urgency, the Respondent submitted that the requirements for an interim interdict had not been established.

[20] The Applicant filed a brief replying affidavit attested to by the legal adviser, who responded to the criticism of the paucity of the Applicant’s case as follows:

“6. With regard to the information that I have received, I refer to the affidavits of the investigating officer, Detective Warrant Officer Lerm.”

[21] The matter may be summed up as follows:

- (a) Alleging that he had fallen into an open stormwater drain the Respondent issued summons claiming damages;
- (b) The matter went to trial on the merits, judgment being granted in his favour;

- (c) The parties settled the Respondent's general damages with the Applicant agreeing to pay the Respondent R650,000.00. The settlement agreement was made an order of court;
- (d) When the Applicant failed to make payment in accordance with the agreement, which had been made an order of court, the Respondent's attorney issues a writ of attachment, which the Sheriff duly executed;
- (e) Alleging that it had information, which it does not specify, from a source, which it does not identify, that the claim is fraudulent, in what manner it is not stated, the Applicant brought this application on an urgent basis, pending an action based on fraud.

[22] An interim interdict is a summary and extraordinary remedy for the prevention of an unlawful interference, or threatened interference, with another's rights pending further proceedings. In this case the Defendant seeks to "freeze" the *status quo* pending an action to declare the Plaintiff's delictual claim fraudulent.

[23] It goes without saying that an applicant who seeks an interdict (in this case an interim one) must at the very least lay some basis for the relief it seeks. In the present matter the Defendant makes out absolutely no case, relying instead on the baldest of allegations, which are, as pointed out by the Respondent's attorney, hearsay. It has been stated that in circumstances such as the present when fraud is alleged three requirements need to be proven, namely:

- (a) Incorrect or misleading evidence was tendered at the trial;
- (b) The evidence was tendered fraudulently with the intention to mislead the court; and
- (c) The false evidence diverged from the true facts to such an extent that the court, had it been aware thereof, would have given a different judgment.

[24] The test to be applied was formulated by De Villiers JA in **Schierhout v Union Government**³ (at p. 98):

“Now a final judgment of a court of law being *res judicata* is not to be lightly set aside. On the other hand it stands to reason that a judgment procured by the fraud of one of the parties whether by forgery, perjury or in any other way such as fraudulently withholding material documents, cannot be allowed to stand. That was the Roman law (C. 7. 58), and that is our law (Voet 42.1.28).

But baseless charges of fraud are not encouraged by courts of law. Involving as they do the honour and liberty of the person charged they are in their nature of the greatest gravity and should not be lightly made, and when made shall not only be made expressly but should be formulated with a precision and fullness which is demanded in a criminal case. In the application now before the Court, it is a matter of the utmost difficulty to ascertain the exact charges of fraud against the Minister.” (Underlined for emphasis).

[25] And in **Mabuza v Nedbank Ltd & Another**⁴ the following was stated (at para [17]):

“[17] In the matter of *Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re Sizwe Development v Flagstaff Municipality* it was held that:

The principles governing the setting aside of a final judgment on the grounds of fraud are succinctly set out by the learned authors Herbstein and van Winsen in *The Civil Practice of the Superior Courts of South Africa* 3rd ed at 470. These principles are set out hereunder:

- (1) A final judgment is *res judicata* and will not be lightly set aside, but the Court will do so if it was procured by the fraud of one of the parties, whether such constituted forgery, perjury or any other

³ 1927 AD 94

⁴ 2015 (3) SA 369 (GP).

fraudulent act such as the fraudulent withholding of material documents — *Schierhout v Union Government* 1927 AD 94 at 98.

- (2) The successful party must have been a party to the fraud — *Makings v Makings* 1958 (1) SA 338 (A).
- (3) It must be shown that, but for the fraud, the Court would not have granted the judgment — *Robinson v Kingswell* 1915 AD 277 at 285.
- (4) There must have been causal connection between the fraud and the judgment.
- (5) The fraud can consist of withholding material information from the Court with fraudulent intent.
- (6) The fact that the judgment was obtained by consent is not a bar to action to have it set aside on the grounds of fraud — *Rossouw v Haumann* 1949 (4) SA 796 (C) at 800.”

[26] From the foregoing it is evident that the test is an onerous one and a judgment will not easily be set aside where fraud is alleged.

[27] What is perplexing is that, if it has information which establishes that the Respondent knowingly gave false evidence, the Applicant does not disclose the nature thereof. Even if the police have valid grounds for not disclosing the contents of a docket at this stage, the same consideration does not apply to the Applicant’s legal adviser. In fact, if the Applicant does have information which establishes fraud on the part of the Respondent it is duty bound to disclose the nature thereof. Its failure to do so is inexplicable. In fact, it is inexcusable.

[28] One is left with the distinct impression that the Applicant has another motive for seeking to avoid satisfying the court order. What that motive might be belongs to

the realms of speculation, which exercise it would be inappropriate to embark upon.

[29] No case is made out that the Respondent committed fraud. The application amounts, to quote **Schierhout**, a “*baseless charge of fraud*.” In the circumstances the Applicant does not satisfy even the first requirement for an interim interdict, namely that on a balance of probabilities the Applicant has established a *prima facie* right, though open to some doubt.

[30] It is accordingly not necessary to deal with the other requirements for an interim interdict.

[31] There is another aspect to consider. The Applicant has applied for an interim interdict pending an action based on fraud. It was argued on behalf of the Respondent that the correct procedure is an application for the rescission of the judgment based on the common law, fraud being one of the grounds for the rescission of a judgment in terms thereof.

[32] Thus, why the Applicant saw fit to seek an interdict pending a separate action is unclear. It should have brought an application for the rescission of the judgment, properly motivated, together with a prayer for the stay of the execution of the judgment.

[33] In conclusion the appeal stands to be dismissed. Insofar as costs are concerned, I am in agreement with the Respondent’s counsel’s submission that bringing the application was reckless, if not malicious, and that the Respondent should not be out of pocket as a result.

[34] The following order will issue:

1. The application is dismissed.
2. The Defendant is ordered to pay the costs on an attorney and client scale.

NJ MULLINS
(ACTING JUDGE OF THE HIGH COURT)

REPRESENTATION:

Obo the Applicant/Defendant:

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