IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 25846/09

In the matter between:

AMRICH 159 PROPERTY HOLDING CC **APPLICANT**

and

ERIC PRUDENT L VAN WESEMB EECK **RESPONDENT**

JUDGMENT

MATHOPO J:

[1] The applicant launched an urgent, ex parte application for the arrest of the respondent *tanquam suspectus de fuga*. The allegation was that the respondent had made arrangements to depart from South Africa with the intention of evading or delaying payments of his debts, and in particular the one owed to the applicant. Moshidi J granted an order for the arrest of the respondent on the 25 June 2009.

[2] The respondent was arrested and taken to Sandton Police Station where he was detained. An application for the reconsideration of Moshidi J's order was sought, on the basis that it was an order made in the absence of a party (respondent). On the 26 June 2009 the respondent was unsuccessful in this application with the result that he remained detained at Sandton Police Station.

[3] On Saturday, the 27 June 2009 the matter came before me in the urgent court and after expressing some discomfort with the continued detention of the respondent at the Police Station, I immediately ordered the release of the respondent subject to the surrender of his passport to the applicant's attorneys. The matter was then postponed to Monday 29 June 2009 for argument on whether the rule nisi granted by Moshidi J should be discharged or not. After hearing argument I dismissed the application with costs, discharged the rule and indicated that I would give my reasons later. These are my reasons:

[4] The circumstances giving rise to this application arise out of the litigation between the applicant and the respondent.

[5] It appears to me that when the original *ex parte* application was sought before Moshidi J he was satisfied that there was a prima facie proof of the fact that the respondent's contemplated departure was with the intention of evading or delaying payment of his debt or at least that the applicant had reasonable grounds for such apprehension.

Now with all the information that is available before me I must decide whether there is sufficient proof to sustain the applicant's case.

[6] The applicant alleges that the respondent failed to comply with his contractual obligations in terms of the sale agreement concluded between the parties on the 10 December 2006 for the purchase of the property situated at 9 Riet Avenue, Woodmead Extension 4.

[7] The respondent took occupation of the property on the 18 December 2006, and was liable to pay occupational rent from that date.

[8] The deposit of the purchase price was to be held in trust by an attorney or agent and the money was then to be invested in an interest bearing account. The interest was to be paid to the applicant in respect of the respondent's occupational rent.

[9] The deposit paid by the Respondent was initially held in trust by the applicant's attorneys and later transferred to the respondent attorneys who according to the applicant inexplicably paid out the money to the respondent on the 06 May 2009, that money included the interest that was due to the applicant in lieu of occupational rent.

[10] The applicant further relied on the fact that the respondent at the hearing of the matter on the 11 June 2009, stated in an affidavit that he has no income in South Africa and that the only funds available to him are those that were remitted to Belgium. It was submitted this was sufficient evidence that the Respondent intended to leave South

Africa permanently and with the purpose of evading or delaying payments of his debts.

[11] Mr Roos who appeared on behalf of the applicant submitted that the summons were issued against the respondent on the 29 May 2009 and he entered appearance to defend on the 17 June 2009. Any judgment obtained against the respondent would be a hollow judgment because he has no assets in South Africa or security for the satisfaction of any judgment to be obtained against him. It was submitted that the court should infer from the respondent's conduct in purchasing air tickets engaging contractors and obtaining quotations for the removal of his assets, as sufficient evidence of someone who was desirous of leaving the country permanently with that intention.

[12] He further submitted that if the respondent could not furnish any sufficient security for the payment of any judgment to be granted in favour of the applicant, he should be detained, and to secure his release he must remit the funds which he transferred to Belgium or find some suitable security. It was submitted that the respondent is also indebted to the applicant for untaxed costs orders obtained against him and to permit his release without providing any security thereof would defeat the applicant's claim if successful in due course.

[13] Mr Sutherland who appeared on behalf of the respondent submitted that the applicant had not made out a case for the order sought, because the applicant has failed to prove the essential element of flight from the creditors by the respondent. It was submitted that on

the undisputed facts, the respondent had always intended to return to Belgium and this was after spending a year in South Africa being unable to secure a suitable employment. The respondent purchased air tickets, engaged and obtained quotations from the contractors to remove his personal assets also prior to the service of the summons. The timing of the departure was arranged to coincide the respondent's son who had just completed his matric and about to commence further tertiary studies, and not to evade or delay payment of his debts.

[14] In my view, service of the summons by the applicant, the purchasing of tickets and obtaining of quotations for the removal of the assets by the respondent *per se* does not constitute sufficient ground to warrant arrest. The undisputed facts reveal that the respondent made arrangements to depart from the Republic of South Africa well before the summons were issued and served on him. He purchased the tickets on the 3 June 2009 and arranged to fly to Belgium on the 30 June 2009. On the 17 June 2009 he instructed his attorney to file a notice of intention to defend action.

[15] On the 4 June 2009 (before the summons were served on him) his attorneys wrote a letter to the applicant's attorneys informing them that the Respondent intended instituting an action for reduction of the purchase price due to the applicants alleged fraudulent misrepresentation and latent defects present on the property. The idea of the counter claim was already in the mind of the respondent before the service of the summons. On the respondent's version such counter claim would exceed the applicant's unliquidated claim.

[16] The sole purpose of the procedure of arrest is prevent flight with the intention of evading or delaying payment of one's debts. The intention to depart is to be inferred from circumstances of each case. A distinction must be drawn between a departure with an intention to evade or delay payment and an innocent departure which may coincidentally lead to that result. The onus rests on the applicant seeking such an order to satisfy the court that there is prima facie proof of that fact or at least show that there is a reasonable apprehension that the flight is being undertaken with the requisite intention. All that the respondent has to do is to show absence of intention to flee.

[17] In my view the procedure of arrest was not devised to prevent a debtor's departure from the Court's jurisdiction but to prevent flight i.e. to prevent his departure with the intention of evading or delaying payment. The reason for leaving the country with the intention of evading or delaying payment of his debts must account for all the proven facts. It is not the effect but the requisite intention which is material.

[18] After considering all the objective factors in this case, I am of the view that the applicant has failed to prove that the respondent made the arrangements to depart with the intention of evading or delaying payment of his debts. Service of the summons cannot turn an already planned innocent departure into a flight with the requisite intention. The respondent did not have the requisite intention to depart from

South Africa permanently with the intention of evading or delaying payment of his debts. I accept as having merit the submission by Mr Sutherland that flight as a motive has not been proved by the applicant.

[19] As a result I come to the conclusion that the contemplated departure is not a flight and that the respondent is not subject to arrest. On this basis alone, the application must fail. Another reason why this application should be dismissed is the constitutionality of the arrest.

[20] Mr Roos relying on the authority of the judgment in **Elliot v Fourie 1992 (2) SA 817 (CPD)** submitted that, at common law the court's jurisdiction to order an arrest *suspectus de fuga* has not been ousted by section 1 of the **Abolition of Civil Imprisonment Act 2 of 1977** (The Act). The latter section provides as follow.

"No court shall have the power to order the civil imprisonment of a debtor for his failure to pay the sum of money in terms of any judgment".

[21] He further submitted that an arrest *suspectus de fuga* at common law is aimed at preventing a debtor from fleeing in order to avoid paying a debt and in support of his argument relied on the authority in **Shell South Africa Edms Bpk v Gross h/a Motor Maintenance 1980 (4) SA 151 (T)**, where De Villiers J held that there was nothing in the Act to indicate that it was in the intention of the legislature to restrict the court's common law right to order an arrest *suspectus de fuga*. He

further held that, at common law the procedure was not limited to an arrest before judgment, it included an arrest where the debtor's intention was to flee in order to escape the judgment. On the basis of this judgment, he argued that, at common law, it cannot be said that the arrest is unconstitutional and submitted that the cases relied upon by Mr Sutherland on this point were clearly distinguishable from the present matter and not apposite.

[22] This judgment was criticised and not followed by Flemming J in Gouveia v Da Silva 1988 (4) SA 55 (W), in essence, he held that the court has a discretion and refused to exercise that discretion in favour of an applicant who sought an order for the arrest *suspectus de fuga* of the respondent against whom he had obtained a judgment. At paragraph 62 F-G stated as follows:

"*The imprisonment which is sought, in its reason, nature and object so closely approximates that civil imprisonment to which the 1977 legislation refers that, if not covered thereby, the modern policies regarding imprisonment for debt cannot be lost sight of. No marked injustice will follow if the applicant is left to the enforcement of the judgments in that country to which the respondent moves. In the overall picture there was no justification for exercising the Court's discretion, if any exists, in applicant's favour*".

[24] Finally at paragraph 58H Flemming J stated that: "*because civil imprisonment is not longer possible, this court has to distinguish what the Dutch writers could afford to blur*".

[23] Mr Sutherland submitted that since the constitutional court in **Coetzee v Government of Republic of South Africa 1995 (4) SA 663 (CC),** a case which dealt with the provision of **section 65 of Magistrate Court Act 32 of 1944**, declared civil imprisonment unlawful, there is equally good reason to declare an arrest under such circumstances unlawful. He argued that to order or an arrest, under these circumstances would not only be draconian but a serious intrusion to the debtor's personal freedom which is guaranteed in section 11 of the constitution.

[25] He further relied on the judgment of **BID Industrial Holdings (Pty) Ltd v Strang & Another 2008 (3) SA 355 (SCA),** a case dealing with the arrest to found jurisdiction where Howie JA remarked as follows at page 365 paragraph 41.

"*Apart from the fact that arrest does not serve to attain jurisdictional effectiveness it cannot be "just cause" to coerce security or, more especially, payment, from a defendant who does not owe what is claimed or who, at least, is entitled to the opportunity to raise a non-liability in the proposed trial. If there is no legal justification for incarcerating a defendant who has been found civilly liable there cannot be any for putting a defendant in prison whose liability has not yet been proved. And as to the function of arrest to enable the court to take cognisance of the suit, that could be appropriately achieved if the defendant were in this country when served with the summons and*

there were, in addition, significant factual links between the suit and South Africa".

[26] He further referred me to the passage in para 46 of the latter judgment where the court observed that no other country, to its knowledge currently utilises arrest as a prerequisite for the exercise of civil jurisdiction.

[27] Finally he submitted that since no decision of the superior court has been reported which directly addresses the constitutionality of Rule 9 of the uniform rules of the High Court or the common law principles of such arrest and detention, the decisions in the BID Industrial and Coetzee cases cited above, should be adopted and the common law should be developed to reflect the constitutional imperatives.

[28] Neither counsel referred me to any legislation or case law after 1994 which justifies the arrest of an individual pending the provision of security. In the present matter, since the summons were served on the respondent in South Africa, jurisdictional problems do not arise or exist. To order the arrest of the respondent on the basis that he is unable to give security, would in my view offend his right to dignity, equality and freedom of movement as enshrined in the Bill of Rights. The continued arrest in such circumstances would be tantamount to coercing security or payment especially where it is manifestly clear that his liability has still not been established and is disputed.

[29] I do not think that the cases cited by Mr Roos are authority for the proposition that the arrest is constitutional because all these cases were decided before the adoption of the Constitution. These cases are all silent on the individual's rights to liberty and freedom of movement.

[30] I align myself with the judgment in BID Industrial Holdings supra, where Howie JA remarked that if there is no obligation for incarcerating a defendant who has been found civilly liable there cannot be any for putting a defendant in prison whose liability has not yet been proved. In the present matter the liability of the respondent has not been determined. To order his arrest particularly since he has a counter claim which on his version exceeds the applicant's unliquidated claim would be contrary to the spirit of the Constitution.

[31] I do not agree with the applicant's submission that, for as long as a litigant fails to pay security, he should be detained indefinitely. In my view it is unfair to expect a litigant who is detained *suspectus de fuga* to litigate under such handicaps (in prison). To rule or order otherwise would mean that a foreign national who enters into a contract with a resident plaintiff, if there is a dispute and is unable to pay any security, must be prevented from returning to his home country until the case has been finalised. If this were to be sanctioned such conduct would seriously erode the confidence which the rest of the world has in our legal system. Our constitution frowns upon such conduct especially where rights of individuals (debtors) are limited because of yet to be determined debts.

[32] The practice of arrest and attachment came about to assist an applicant incola who would otherwise have to sue abroad. The position is different in this matter, jurisdictional problems do not arise. The only concern which the applicant has in this matter is one of execution of the judgment if successful in the main action.

[33] In my view if a creditor (or alleged creditor) in the position of the applicant wishes to protect his position in respect of the person leaving the country it must use other legal remedies that do not allow or violate the personal freedom of the debtor (Respondent).

[34] I have no doubt that there are better and less restrictive means to enforce a debt short of arrest, because creditors are able to have the judgment made a judgment of a court in a foreign country to which the debtor may flee, the difficulty regarding execution is not insurmountable, for example the sheriff in that country may be able to do what the sheriff in South Africa is capable of doing i.e attaching the assets of the respondent (debtor) in the event of a judgment..

[35] I finally conclude that to the extent that the common law may be at odds or variance with the Constitution it should be developed, because an arrest under such circumstances cannot pass the limitation test in section 36, as it is contrary to the spirit, purport and objects of the bill of rights. However since this point was not argued extensively by the parties I will refrain from making any pronouncements in this regard.

In the light of my earlier finding my views are obiter particularly since no notice of the declaration of invalidity was served on other interested stakeholders inter alia Minister of Justice.

[36] In the light of the above facts, I would dismiss the application.

In the result I make the following order:

i. The application is dismissed

ii. The applicant is ordered to pay the costs of this application which costs shall include the costs of two counsel as well as the reserved costs on the 27th June 2009.

R MATHOPO

JUDGE OF THE HIGH COURT

Appearances

For the Applicant	:	ADV ROOS SC
Instructed by	:	JORDAAN & WOLBERG ATTORNEYS
For the Respondent	:	ADV SUTHERLAND SC
		ADV M AUGUSTINE
Instructed by	:	BARRY AARON & ASSOCIATES
Date of hearing	:	29 JUNE 2009
Date of Judgment	:	21 AUGUST 2009